No. 88-1170

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In The

Supreme Court of the United States

October Term, 1988

BOISE-KUNA IRRIGATION DISTRICT, NAMPA & MERIDIAN IRRIGATION DISTRICT, NEW YORK IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT, BIG BEND IRRIGATION DISTRICT AND WEISER IRRIGATION DISTRICT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, AND THE TWIN FALLS CANAL CO. AND NORTH SIDE CANAL CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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QUESTIONS PRESENTED

The McCarran Amendment, 43 U.S.C. § 666, waives the sovereign immunity of the United States in a suit for the adjudication of the rights to the use of water of a river system or other source. Does the McCarran Amendment impose a geographical limitation on the discretion of the states to set the boundaries of an adjudication so that Idaho may not adjudicate only a portion of the Snake River but must instead adjudicate the entire Snake River in Idaho and all of its tributaries – including those which the Idaho legislature had excluded as previously adjudicated – in order to obtain jurisdiction over the United States?

LIST OF PARTIES

The parties to the proceeding in the Idaho Supreme Court were the Petitioners – the Boise-Kuna, Nampa & Meridian, New York, Wilder, Big Bend Irrigation Districts, and Weiser Irrigation District – and the Respondents, the United States of America, the Twin Falls Canal Company and North Side Canal Company. Water District No. 67 was a separate appellant in the proceedng before the Idaho Supreme Court, and the Weiser Irrigation District was later substituted for it as an appellant. Water District No. 67A was also a separate appellant, but stipulated that its appeal be dismissed before the case was briefed or argued to the Idaho Supreme Court.

The State of Idaho, ex rel. R. Keith Higginson in his official capacity as Director of the Idaho Department of Water Resources, was an appellee in the proceeding below. The State of Idaho, however, did not brief the McCarran Amendment question but instead argued that there were adequate state law grounds to sustain the judgment of the district court. See p. 9 and note 3, *infra*. It is thus not named in the caption as a respondent before this Court.

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No. _____

In The

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BOISE-KUNA IRRIGATION DISTRICT
NAMPA & MERIDIAN IRRIGATION
DISTRICT, NEW YORK IRRIGATION
DISTRICT, WILDER IRRIGATION DISTRICT
BIG BEND IRRIGATION DISTRICT,
AND WEISER IRRIGATION DISTRICT,

Petitioners,

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THE UNITED STATES OF AMERICA,
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SIDE CANAL CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

The Petitioners, the Boise-Kuna, Nampa & Meridian, New York, Wilder, Big Bend and Weiser Irrigation Districts, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Idaho entered in the above-entitled proceeding on October 13, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho is reported at ___ Idaho ___, 764 P.2d 78, and is reprinted in the Appendix hereto, page la, *infra*. The memorandum decision of the District Court of the Fifth Judicial District for Twin Falls County, Idaho has not been reported. It is reprinted in the Appendix hereto, page 27a, *infra*.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on October 13, 1988 affirming the decision of the district court that the McCarran Amendment, 43 U.S.C. 666, required the inclusion of the entire Snake River system in Idaho to obtain jurisdiction over the United States. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

McCarran Amendment

43 U.S.C. § 666. Suits for adjudication of water rights.

(a) Joinder of United States as defendant; costs

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by

exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

(July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560.)

Idaho Code § 42-1406A is necessary for the framing of the federal question. It may be found at p. 58a.

STATEMENT OF THE CASE

The Snake River is the largest river system in Idaho, with a drainage area of approximately 87% of the state. The Snake River rises in Wyoming, flows through southern Idaho, briefly leaves the state near Homedale, Idaho,

and then returns to form the boundary between Idaho and Oregon and Idaho and Washington until it leaves Idaho near Lewiston to flow eventually into the Columbia River. See p. 60a. Exh. 176, p. 5; Exh. 180. Water from the Snake River and its tributaries is of great importance to the state. It affects the economic well-being of the vast majority of the state's population. In 1985, the Idaho legislature directly expressed its will as to how rights to the use of the water from the Snake River and its tributaries should be administered.

The Idaho legislature, in Idaho Code § 42-1406A (1985),[1] required the Director of the Idaho Department of Water Resources ("the Director") to petition the state district court to commence a general adjudication of certain waters in the Snake River basin. The legislature required the Director to include all of the Snake River basin within the state of Idaho upstream from the point at which the Snake River leaves the state of Idaho near Homedale and enters the state of Oregon. It gave the Director the discretion to commence an adjudication of the water rights of the main stem of the Snake River where it forms the boundary between the state of Idaho and the states of Oregon and Washington. Idaho Code § 42-1406A(3)(b).

As to the adjudication of this downstream part of the main stem, the legislature prohibited the Director from

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[1] Idaho Code § 42-1406A is reproduced in the appendix, p. 58a.

including any "adjudicated tributary" within its boundaries unless the United States "refuse[d] to consent" to jurisdiction under the McCarran Amendment:

> The director *shall not* include in the petition filed under this paragraph any adjudicated tributary unless the United States, or other parties whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. section 666.

Idaho Code § 42-1406A(3)(b) (emphasis added).

The "adjudicated tributaries" to which the legislature referred are the Boise, Payette, Weiser and Lemhi River systems. Idaho Supreme Court Opinion, p. 8a. The Boise River enters the Snake near Nyssa, Oregon downstream from the point where the Snake begins to form the border between Idaho and Oregon.

The McCarran Amendment to which Idaho Code § 1406A(3)(b) refers waives the defense of sovereign immunity by the United States to any suit for the adjudication of rights to the use of water of a river system or other source:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by

exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666.[2]

Pursuant to Idaho Code § 42-1406A(3)(b), the Director filed a petition with the district court. The Director chose to include the lower main stem of the Snake River in the adjudication. Because of the prohibition in Idaho Code § 42-1406A(3)(b), he excluded the "adjudicated tributaries" of the main stem. The Director also proposed to exclude the portion of the lower main stem downstream from the confluence of the Snake River and the Salmon River, referred to by the district court as the lower Snake River basin. R. Vol. I, pp. 4 *et seq.*, ¶ 12. See p. 61a. Thus no portion of the main stem which forms the boundary between Idaho and Washington was included in the petition.

The Director stated he was unable to ascertain whether the United States objected to jurisdiction if the adjudication did not include the adjudicated tributaries of the lower main stem. He thus asked the district court to determine whether the United States objected to jurisdiction. R. Vol. I, p. 8, ¶ 14; p. 15, ¶ 1.

The district court requested briefing and held a hearing on the jurisdictional issues raised by the Director in his petition. R. Vol. I, pp. 19, *et seq.* Parties took various positions in regard to the appropriateness of the boundaries set forth by the Director.

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[2] The full text of the McCarran Amendment is set out at pp. 2-3, *supra.*

The Boise-Kuna Irrigation District, the Nampa & Meridian Irrigation District, the New York Irrigation District, the Wilder Irrigation District and the Big Bend Irrigation District (the "Districts" or "Petitioners") are irrigation districts with water rights or an interest in water rights from the Boise River. The Weiser Irrigation District, Co-petitioner, is an irrigation district with water rights or an interest in water rights from the Weiser River.

The Districts, among others, contended that the Snake River Adjudication, with the boundaries as set forth in the petition of the Director with the adjudicated tributaries excluded, was a general adjudication sufficient to confer McCarran Amendment jurisdiction over the United States. The Petitioners agree with the Idaho legislature that the Boise and Weiser Rivers can continue to be administered under their previous adjudications and that the expense of a readjudication is wasteful and unnecessary. The Districts estimate that it would cost them over $500,000 simply to file claims in the adjudication, *see* I.C. § 42-1414, which would not include attorneys fees and other costs over the 10-20 years the Department estimates it will take to complete the adjudication.

The Justice Department (by a special appearance), the Idaho Power Company and the Twin Falls Canal Company and the North Side Canal Company contended that the adjudicated tributaries were necessary in order to confer McCarran Amendment jurisdiction. The State of Idaho argued that the court did not have to determine the McCarran Amendment question as to the adjudicated tributaries because the Idaho legislature, in enacting Idaho Code § 42-1406A(3), intended to give the United

States unfettered discretion to decide for itself whether or not to submit to the jurisdiction of the state court.

The Justice Department and the State of Idaho further contended that it was not necessary to extend the adjudication to the lower Snake River basin in order to obtain McCarran Amendment jurisdiction. The Idaho Power Company and the Twin Falls Canal Company contended that it was.

The district court filed a memorandum opinion on October 14, 1987, p. 27a *et seq.* On November 19, 1987, it issued a Commencement Order adopting the findings of fact and conclusions of law contained in its memorandum opinion. R. Vol. II, p. 378 *et seq.* The court held:

> 1. That the Idaho legislature in Idaho Code § 42-1406A(3) had intended to give the United States the discretion to decide whether the "adjudicated tributaries" should be included in the adjudication. Since the United States had objected to the adjudication without their inclusion, the "adjudicated tributaries" had to be included;
>
> 2. That in any event the "adjudicated tributaries" had to be included to confer McCarran Amendment jurisdiction over the United States;
>
> 3. That the entire lower Snake River basin had to be included in order to obtain McCarran Amendment jurisdiction over the United States.

Pursuant to Idaho Code § 42-1418 and an order of the Idaho Supreme Court allowing an immediate appeal from an order of the district court commencing the adjudication, the Districts filed a timely appeal of the court's order as to the Boise River. Water District No. 67 also filed a timely appeal as to the Weiser River. Leave was

subsequently granted to substitute the Weiser Irrigation District for Water District No. 67.

No one appealed the inclusion of the lower Snake River basin or the inclusion of the other two adjudicated tributaries, the Payette and the Lemhi. The Districts named as respondents the United States and the State of Idaho.[3] The Twin Falls Canal Company and North Side Canal Company were then granted intervention as respondents by the Idaho Supreme Court.

The Idaho Supreme Court held that Idaho law did not and could not give the U.S. unfettered discretion to decide the boundaries of the adjudication. It thereby decided the state law question in favor of Petitioners. It then examined the federal question and held that the entire Snake River system in Idaho had to be included in the adjudication to obtain McCarran Amendment jurisdiction:

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[3] On appeal, the State of Idaho did not brief the McCarran Amendment question. It instead argued that there were adequate state law grounds to affirm the judgment of the district court:

> "[T]he question of McCarran Amendment jurisdiction is not an issue in this appeal. The issue is whether the district court properly found that the United States refused to consent [pursuant to Idaho Code § 42-1406A(3)(b)] to the existence of McCarran Amendment jurisdiction if the adjudicated tributaries were excluded from the adjudication." State's Brief, p. 28.

> The McCarran Amendment requires the adjudication of the rights of all those who use the water of a river system within a state, including those who use the water of tributaries.

Id., 764 P.2d at 86, 21a.

As defined by the legislature without the adjudicated tributaries, the Snake River Adjudication would involve approximately 160,000 claimants. Tr, p. 109. As redefined by the Idaho Supreme Court, the Snake River Adjudication even by the estimates of the Department of Water Resources, which may be conservative, will be lengthy (10 to 20 years) and expensive ($28 million dollars), and involve up to 185,000 claimants. R.Vol. I, p. 138. It may well be the largest single water rights adjudication in the history of the West.

The decision by the Idaho Supreme Court is the only one the Districts are aware of under the McCarran Amendment which imposes a geographical limitation on the ability of states to administer their water. It conflicts in principle with decisions of this Court concerning the boundaries of adjudications arising out of the State of Colorado, and it is the first opportunity for this Court to address such McCarran Amendment issues arising out of a state other than Colorado. The federal issue is clearly and simply presented for this Court's decision. It is thus worthy of consideration by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE IDAHO SUPREME COURT SEVERELY LIMITS THE DISCRETION GIVEN TO THE STATES BY CONGRESS IN THE McCARRAN AMENDMENT TO ADMINISTER THEIR WATER RIGHTS AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER COURTS.

Water is of crucial importance to the arid west. While pursuing national programs, Congress has deferred to the western states, in large measure, over water law and policy.[4]

The State of Idaho strongly adheres to a policy of full control over its water:

> The legislature finds and declares that a central component of state sovereignty is the inherent right of the state to regulate and to control the natural resources of this state. In a state such as Idaho, it is essential that the state exercise its full authority to manage its water. To that end, it is the purpose of this act to provide for the full exercise of all the state's rights and responsibilities to manage its water resource.

1988 Idaho Sess. Laws, H.B. No. 780.

In many instances, this Court has recognized a federal policy of deference to these state policies. Thus, unless there is a reserved water right, federal agencies

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[4] For a listing of 37 statutes recognizing the applicability of state water law, *see* Hearings on S. 1275 before the Subcomm. on Irrigation and Reclamation of Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. 302-310 (1964) (App. B, Supplementary Material submitted by Sen. Kuchel).

must appropriate necessary water rights in conformity with state law. *California v. United States,* 438 U.S. 660, 665 (1978). States may impose any conditions on the control, appropriation, use or distribution of water from a federal reclamation project that are not inconsistent with clear congressional directives respecting the project. *Id.* at 672-675. Even water rights reserved for national forest land are for relatively narrow purposes and do not include reservations for purposes of recreation, aesthetics, wildlife preservation or cattle grazing. *United States v. New Mexico,* 438 U.S. 696 (1978). Likewise, congressional water policy in the mining laws is passive and affirms the view that private water rights are governed by local law and custom. *Andrus v. Charlestone Stone Products, Inc.,* 436 U.S. 604, 614 (1978). Finally, pursuant to the McCarran Amendment, federal water rights–both reserved and nonreserved–are to be adjudicated and administered in state courts. *United States v. District Court in and for the County of Eagle,* 401 U.S. 520 (1971).

This Court has also recognized the paramount importance of the McCarran Amendment in this policy of congressional deference to state water law:

> Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States to state-court jurisdiction for general stream adjudications:
>
> > "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

* * *

> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." 8. Rep. No. 755, 82d Cong., lst Sess., 3, 6 (1951).

California v. United States, supra, 438 U.S. at 678, 679.

State court jurisdiction over the United States in general stream adjudications is important because those adjudications determine the existence, quantity, and priority of a water right. The power to define the scope of an adjudication is a crucial one, and this case gives this Court the opportunity to affirm the powers of the states to define the scope of adjudications.

In interpreting the McCarran Amendment, the Justice Department, the Idaho Supreme Court, and the Petitioners disagree concerning the meaning of the language "suit . . . for the adjudication of rights to the use of water of a river system or other source" used by Congress. The Districts argued before the Idaho Supreme Court that the Snake River Adjudication without the adjudicated tributaries is an "adjudication . . . of a river system or other source" because the McCarran Amendment gives the states the discretion to decide the boundaries of general adjudications.

The Justice Department argued that there is a geographical limitation built into the phrase "adjudication . . . of a river system or other source" that limits the discretion of the states to define the boundaries of an adjudication. The Justice Department contended that the

Snake River Adjudication, without the inclusion of the adjudicated tributaries, was not an adjudication of a "river system or other source" because all tributary river systems upstream from the terminous point of the adjudication on the lower main stem were not included.

The district court and the Idaho Supreme Court went even further in their interpretation of the McCarran Amendment and held the McCarran Amendment did not permit adjudication of part of a system within a state, holding instead that an entire river, including all of its tributaries, must be included in an adjudication to obtain jurisdiction over the United States. 764 P.2d at 86, p. 21a; Memorandum Opinion, p. 52a.

The interpretations of the McCarran Amendment by the Justice Department[5] and by the Idaho courts are incorrect. Nowhere in the legislative history of the

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[5] It is important to recognize that the United States Department of Justice has not always been generous towards the states in dealing with the McCarran Amendment. Thus, the Justice Department was the prime opponent of its passage. It since has contended that the McCarran Amendment did not authorize the adjudication of reserved water rights. *United States v. District Court in and for the County of Eagle, supra.* It then argued that Indian reserved water rights were not within the scope of the McCarran Amendment. *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976). It further argued that although reserved rights could be adjudicated, they could not be quantified. *Avondale Irrigation District v. North Idaho Properties, Inc.,* 96 Idaho 1, 523 P.2d 818 (1974). It also argued that a single tributary of the Colorado River could not be adjudicated under the McCarran Amendment but instead the entire Colorado River had to be adjudicated. *United States v. District Court in and for the County of Eagle, supra.*

McCarran Amendment or the judicial decisions interpreting it is there any support for a uniform monolithic definition of "adjudication of . . . river system or other source." The states have always had the discretion to define the boundaries of adjudications consistent with their best judgment as to how their waters should be administered.

This Court has specifically rejected narrow interpretations of the statute which would defeat its primary purpose to insure the participation of the United States in state general adjudication proceedings. *United States v. District Court in and for the County of Eagle,* 401 U.S. 520 (1971); *United States v. District Court in and for Water Division No. 5,* 401 U.S. 527 (1971). The opinion of the Idaho Supreme Court conflicts in principle with these decisions.

In *Eagle County,* this Court was concerned with a supplemental adjudication of the Eagle River. The Eagle River is a short tributary of the Colorado River in western Colorado. The United States argued that the Eagle River was not a "river system", apparently because the Colorado River, to which it was a tributary, was not included. *United States v. District Court in and for the County of Eagle, supra,* at 523. This Court dismissed this argument as being "almost frivolous":

> The consent to join the United States "in any suit (1) for the adjudication of rights to the use of water of a river system or other source" would seem to be all-inclusive. We deem almost frivolous the suggestion that the Eagle and its tributaries are not a "river system" within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs

> through or touches many States. The "river system" must be read as embracing one within the particular State's jurisdiction.

Id.

If, under *Eagle County*, a tributary of a major river may be adjudicated, then it would follow that under *Eagle County* a tributary could be excluded from the adjudication of a major river. The Idaho Supreme Court's decision conflicts with this holding by requiring all portions of a river system to be included.

This Court in *Eagle County* demonstrated in another way that the McCarran Amendment is to be read broadly to effectuate its purpose to confer state jurisdiction over the United States. The United States had argued that since the present proceeding was a supplemental adjudication and those whose rights had been decreed in prior adjudications were not present, the suit was not within the consent given by the Amendment because all of the owners of the rights would not be present. The Court rejected this argument stating: "We think that argument is extremely technical; and we decline to confine 43 U.S.C. § 666 so narrowly." *Id.* at 525.

United States v. District Court in and for Water Division No. 5, supra, was a companion case to the *Eagle County* case. The Colorado state court was given responsibility for water rights determinations affecting "all lands in the State of Colorado and the drainage basins of the Colorado River and all of its tributaries arising within Colorado, *with the exception of the Gunnison River.*" Colo. Rev.

Stat. § 37-92-201(1)(e) (emphasis added). The state contemplated monthly proceedings before a water referee on water rights applications.

Because the only water rights considered in the proceeding were those for which an application had been filed within a particular month, the United States argued that the proceeding did not constitute a general adjudication under the McCarran Amendment. It apparently did not even argue that the jurisdiction was not proper because the Gunnison River was not included. This Court rejected the United States' contention because of the broad scope of the adjudication, and it distinguished its previous decision in *Dugan v. Rank*, 372 U.S. 609 (1963), as a case involving only a private suit between a few claimants.

The Idaho Supreme Court briefly acknowledged *Eagle County* and *Water Division No. 5*. While its basis for not applying those decisions is not clear, it appeared to rely on what it perceived as a unique method of adjudicating water rights in Colorado by water district or division, an isolated quote from *Water Division No. 5*, and the fact that the Gunnison River, while not part of the adjudication in *Water Division No. 5*, was to be adjudicated in a separate proceeding in a different water division. The Idaho Court was clearly incorrect in its perceptions and analysis.

The holdings of this Court in *Eagle County* and *Water Division No. 5* were not premised on Colorado's system of

water administration[6], which this Court never discussed. Instead, this Court focused only on the particular adjudications at issue. As this Court since has stated, the McCarran Amendment's grant of jurisdiction was not intended to vary from state to state:

> "the [McCarran] Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights, and nowhere in its text or legislative history do we find any indication that Congress intended the efficacy of the remedy to differ from one State to another."

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 564 (1983).

This would be the first case before this Court dealing with the geographical scope of an adjudication from a state other than Colorado. It would thus give this Court the opportunity to confirm that the rulings in *Eagle County* and *Water Division No. 5* apply to all western

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[6] Of the fourteen western states that adhere to the appropriation doctrine to determine water rights, Colorado has established a somewhat unique system, whereby separate water divisions have been created for determination of water rights within the division. *See United States v. District Court in and for County of Eagle*, 458 P.2d 760, 762 (Colo. 1969), *aff'd*, 401 U.S. 520 (1971). In essence, Colorado has seven separate but simultaneous adjudications proceeding in specialized courts throughout the state. Idaho, like the vast majority of western states, does not rely on water divisions to adjudicate its water rights. See Idaho Code § 42-1401 *et seq.*

states and that the McCarran Amendment's grant of jurisdiction does not vary from state to state.[7]

Nor is there anything that indicates this Court's opinion in *Water Division No. 5* was somehow dependent on the existence of an ongoing adjudication of the Gunnison River in a different water division. The Idaho Supreme Court referred to the following language where this Court stated:

> The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month-by-month, but inclusively in the totality . . .

United States v. District Court in and for Water Division No. 5, 401 U.S. at 529.

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[7] At the time the McCarran Amendment was enacted, Congress was well aware that the western states had different procedures for adjudicating water rights within their respective jurisdictions. The Idaho Supreme Court ignored legislative history which so indicated and which confirmed Congress was aware that state adjudications would reach only portions of a river within a state. *See* Hearings on S.18, before a Subcomm. of the Committee on the Judiciary, 82nd Cong., lst Sess., 27-28, 30-31 (1951) (dialogue between Senator Watkins of Utah and the attorney for the City of Denver); *id.*, p. 67 (letter of Peyton Ford, deputy attorney general indicating that the passage of the McCarran Amendment would result in "piecemeal adjudications" of water rights); 98 Cong. Rec., 9446 (daily ed., July 4, 1952) (i.e., statement of Representative Rooney that under McCarran Amendment, United States would have to appear "in every one of the State courts of the State of California and other Western States"). The legislative history and lower court cases cited by the Idaho Supreme Court primarily discuss the difference between private suits and adjudications and do not set any geographical requirements for an adjudication. 764 P.2d at 83-85, pp. 14a-17a.

That language was in response to the Justice Department's argument that the Colorado proceedings in *Water Division No. 5* did not constitute a general adjudication because the only water rights considered were those for which an application was filed within a particular month. In other words, this Court affirmed Colorado's procedure of allowing its courts to consider claims on a month-by-month basis rather than forcing every claimant to make a simultaneous appearance. Moreover, the Court stated that "this suit" reaches all claims, not that this suit and the suit in another water division reach all claims. Therefore, it is apparent from the context of this quotation that the language of "all claims" being reached does not refer to the claims on the Gunnison River in another water division.

The Idaho legislature defined the Snake River Adjudication to exclude certain adjudicated tributaries, including the Boise and Weiser Rivers. Like the Colorado adjudications in *Eagle County* and *Water Division No. 5*, the adjudication as defined by the Idaho legislature includes all claimants within the geographic boundaries of the river system being adjudicated. The fact that there are claimants to other river systems not included in the Snake River Adjudication does not change the fact that all claimants within the area being adjudicated are before the court. In this respect, the Snake River Adjudication as delineated by the Idaho legislature is no different from the Colorado adjudications in *Water Division No. 5* or *Eagle County*. To argue that such an adjudication is not within the scope of the McCarran Amendment would be "frivolous" and "extremely technical."

Consistent with the Congressional grant of discretion to the states to determine the scope of adjudications, the only cases the Petitioners have been able to discover that deny state jurisdiction under the McCarran Amendment are those that may be described as "private suits."

In *Dugan v. Rank*, 372 U.S. 609 (1963), a limited number of riparian water right claimants on the San Joaquin River brought an action seeking an injunction against certain parties, including the United States government, from operating the Friant Dam on that river. This Court held that the McCarran Amendment did not grant jurisdiction over the United States under those circumstances because the case was a "private suit to determine water rights solely between the respondents and the United States and local reclamation bureau officials" rather than a "*general* adjudication" of all rights of the owners upon a particular stream. *Id.* at 617 (Emphasis in original).

As this Court said:

> As we said in the *Eagle County* case, the words "general adjudication" were used in *Dugan v. Rank*, 372 U.8. 609, 618, 83 S.Ct. 999, 1005, 10 L.Ed.2d 15, to indicate that 43 U.S.C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants.

United States v. District Court in and for Water Division No. 5, *supra*, 529 (1971). *Accord, United States v. Bluewater-Toltec Irrigation Dist.*, 580 F.Supp. 1434, 1438 (D.N.M. 1984), *aff'd*, 608 F.2d 986 (10th Cir. 1986).

In *Dugan v. Rank*, this Court thus drew a line between private suits and general adjudications. The McCarran Amendment grants jurisdiction over the latter, but not

the former. The Idaho Supreme Court cited *Dugan v. Rank,* but it made no analysis as to why the Snake River Adjudication without the Boise and Weiser Rivers would be a "private suit."

The Snake River Adjudication, with the boundaries set by the Idaho legislature and proposed by the Director in his petition, clearly is not a "private suit." It will involve an estimated 160,000 individuals. It will, consistent with *Dugan v. Rank,* include all claimants to water rights along the river within the boundaries established by the legislature. It seeks to grant relief between those claimants. And it seeks to adjudicate priorities to the rights claimed by all parties. While the Justice Department and the Idaho courts may feel that the Snake River Adjudication is not a "general adjudication" as they would subjectively like to have its boundaries drawn, that is not the question. As long as it is not a private suit, which it clearly is not, there is jurisdiction over the United States pursuant to the McCarran Amendment. This case then offers the opportunity for this Court to reaffirm *Dugan v. Rank, supra,* more than twenty-five years after it was decided, and to make clear that it is only private suits among a few individuals that the McCarran Amendment prohibits.

The opinion of the Idaho Supreme Court not only violates the precedents of this Court and other courts[8], it will also cause irreparable harm to the states' administration of their water resources. Holding that McCarran

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[8] For example, in *United States v. District Court in and for the County of Eagle,* 458 P.2d 760, 766 (Colo. 1969), *aff'd,* 401 U.S. 520 (1971), the court held:

(Continued on following page)

Amendment jurisdiction would be obtained only by the inclusion of the largest possible number of tributary river systems would deprive the states of much flexibility in administering their water.

For example, it would mean that Washington and Oregon, in order to adjudicate a portion of the Columbia River, would have to adjudicate the entire Columbia River system within their states. For Montana to have a general adjudication of a portion of the Missouri River, it would have to adjudicate the entire Missouri River and its tributaries within the state. For Colorado, Utah or

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(Continued from previous page)

> It is obvious that a state-wide adjudication can be just as fragmentary as that of a water district. At most, the differences are matters of degree. Therefore, we conclude that a proceeding under C.R.S. 1963, 148-9-7 in Water District 37 – or in any other water district – constitutes an adjudication of rights to the use of water of a *river system* contemplated by the McCarran Amendment.

(Emphasis in original.) *See also Federal Youth Center v. District Court in and for the County of Jefferson*, 575 P.2d 395, 401 N. 5 (Colo. 1978) ("the McCarran Amendment does not require that all claimants along an entire *river* or *river system* be joined- . . . Nearly any proceedings to administer water rights will by necessity consider only a fragment of a particular river system"); *United States v. City and County of Denver*, 656 P.2d 1, 10 (Colo. 1982) ("the organization of Colorado water adjudications into districts of relatively limited geographic scope did not render the consent of the United States inapplicable"); *Id.* at 9-10. *In Re Green River Drainage Area*, 147 F.Supp. 127, 134-35 (D. Utah 1956); *In re Green River Adjudication*, 404 P.2d 251 (Utah 1965) (adjudication of upper Green River); *cf. Miller v. Jennings*, 243 F.2d 157, 159 (5th Cir.), *cert. denied*, 355 U.S. 827 (1957) (adjudication of upper Rio Grande would have been proper if suit were an adjudication rather than a class action).

Arizona to adjudicate a portion of the Colorado River, they would have to adjudicate the entire Colorado River and all its tributaries within their states. Moreover, on the many smaller river systems in the western states, it could mean that the states would have no discretion to adjudicate portions of a river, such as the upper half or the lower half. The decision of the Idaho Supreme Court is thus of national importance and deserves consideration by this Court.

II.

THE JUDGMENT OF THE IDAHO SUPREME COURT IS A "FINAL JUDGMENT" PURSUANT TO 28 U.S.C. § 1257

The judgment of the Idaho Supreme Court is a "final judgment", pursuant to 28 U.S.C. § 1257, even though after its opinion there will be further proceedings in the adjudication. Under the standards set forth by this court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this is a case where "reversal of the state court on the federal issue would be preclusive of any further ligitation on the relevant cause of action", *id.* at 482-83, and when the failure to consider the state court decision immediately might seriously erode federal policy. In addition, because both by state statute and special order of the Idaho Supreme Court, the Districts had to present their appeal of the jurisdictional question at this stage of the proceedings, they may be barred from further appeals if they do not present a petition for certiorari at this time.

Indeed, in similar water rights adjudications, this Court has accepted review of initial determinations of the scope of water rights adjudications. For example, both *Eagle County* and *Water Division No. 5* were decided by this Court pursuant to writs of certiorari after preliminary proceedings to determine the scope of the adjudication had been held in the district courts and the Supreme Court of Colorado. In neither of those cases was the question of the propriety of appellate review given any extended discussion.

If this Court reverses the Idaho Supreme Court, the Boise and Weiser Rivers will be excluded from the adjudication; and there will be no further litigation as to them, as the state law questions will have been decided in favor of Petitioners. If this Court does not grant this petition, Petitioners would be barred from again appealing the inclusion of the Boise and Weiser Rivers in the adjudication to the Idaho Supreme Court. Even if this Court permitted review when the adjudication was over (ten to twenty years in the future), the federal policy underlying the McCarran Amendment giving the states the discretion to administer their water rights would have been subverted both in Idaho, where the Idaho legislature's desire not to readjudicate the adjudicated tributaries was thwarted, and in other Western states which would have to deal with the precedent set in Idaho.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. If the Petitioners are correct in urging

that the Idaho Supreme Court erred in ruling that the Boise and Weiser Rivers had to be included in the Snake River Adjudication, this matter should be remanded to the Idaho Supreme Court for appropriate disposition.

RESPECTFULLY SUBMITTED this 10 day of January, 1989.

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1988 Opinion 92.

IN THE SUPREME COURT OF THE STATE OF IDAHO

Nos. 17267, 17275

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM.

BOISE, MAY 1988 TERM

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as Director of the Idaho Department of Water Resources,

Petitioner-Respondent,

v.

THE UNITED STATES OF AMERICA; THE STATE OF IDAHO; and all claimants of water from the Snake River Basin Water System,

Defendants.

FILED: October 13, 1988

FREDERICK C. LYON, CLERK

BOISE-KUNA IRRIGATION DISTRICT, NAMPA & MERIDIAN IRRIGATION DISTRICT, NEW YORK IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT and BIG BEND IRRIGATION DISTRICT,

Defendants-Appellants,

THE STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as Director of the Idaho Department of Water Resources,

Petitioner-Respondent,

and

THE UNITED STATES OF AMERICA; THE STATE OF IDAHO,

Defendants-Respondents,

and

TWIN FALLS CANAL COMPANY and NORTH SIDE CANAL COMPANY,

Intervenors-Respondents.

IN RE: THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM.

STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his official capacity as Director of the Idaho Department of Water Resources,

Petitioner-Respondent,

v.

THE UNITED STATES OF AMERICA, THE STATE OF IDAHO, and all claimants to the use of water from the Snake River Basin Water System,

Defendants-Respondents.

STATE OF IDAHO, EX REL. R. KEITH HIGGINSON in his offical capacity as Director of the Idaho Department of Water Resources,

Petitioner-Respondent,

and

TWIN FALLS CANAL COMPANY and NORTH SIDE CANAL COMPANY,

Intervenors-Respondents,

v.

WEISER IRRIGATION DISTRICT,

Defendant-Appellant,

and

WATER DISTRICT 67A AND all Users therein,

Defendants.

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Twin Falls County. Hon. Daniel C. Hurlbutt, Jr., District Judge.

Appeal from an order of the district court which included the Boise River and Weiser River sub-basins within the boundaries of the Snake River basin water adjudication. *Affirmed.*

Hawley, Troxell, Ennis & Hawley, of Boise, Idaho, attorneys for Defendants-Appellants, Wilder Irrigation District, Mr. Don A. Olowinski, Esq., argued.

Ringert, Clark, Harrington, Reid, Christenson & Kaufman, Boise, Idaho, attorneys for Defendants-Appellants, Nampa & Meridian Irrigation Districts. Mr. William F. Ringert, Esq., argued.

Givens, McDevitt, Pursley, Webb & Buser, of Boise, Idaho, attorneys for Defendants-Appellants, New York Irrigation District. Mr. Raymond D. Givens, Esq., argued.

Hon. Jim Jones, Attorney General; Clive Strong, Deputy Attorney General, of Boise, Idaho, attorneys for Petitioner-Respondent, State of Idaho. Mr. Clive Strong, Esq., argued.

Hon. Maurice O. Ellsworth, United States Attorney; and Jeffery G. Howell, Assistant United States Attorney, of Boise, Idaho; and William B. Lazarus, Assistant United States Attorney, of Department of Justice, Lands Division, of Washington, D.C., attorneys for Defendants-Respondents, the United States of America. Mr. William B. Lazarus, Esq., argued.

Nelson, Rosholt, Robertson, Tolman & Tucker, of Twin Falls, Idaho, attorneys for Intervenors-Respondents, Twin Falls Canal Company and North Side Canal Company. Mr. Terry Thomas Uhling, Esq., argued.

JOHNSON, J.

This case involves the adjudication of water rights in the Snake River basin. The primary issue presented is whether the trial court properly included the Boise River and Weiser River sub-basins in defining the boundaries of the water system to be adjudicated. We affirm the commencement order of the trial court requiring the inclusion of these sub-basins in the adjudication. We hold that their inclusion of these is required in order to

obtain jurisdiction over the United States under the McCarran Amendment (42 U.S.C. § 666).

I.

THE FACTS AND PRIOR PROCEEDINGS

This case is a sequel to the decision of this court in Idaho Power Co. v. State, 104 Idaho 575, 661 P.2d 741 (1983). In that case this Court held that the subordination clause included in the Federal Power Commission license granted to Idaho power Company for the Hell's Canyon project applied only to the water rights at the Hell's Canyon project and not to those at Swan Falls or to any other dams further up the Snake River. This Court remanded the case to the trial court for further proceedings to resolve the affirmative defenses. Idaho Power responded by filing a second lawsuit naming as defendants the State of Idaho and approximately 7500 persons claiming water rights in the Snake River basin. Idaho Power Co. v. Idaho Department of Water Resources, Ada County Civil Case Number 81375.

In 1984 in an effort to resolve these cases an agreement was entered into among the State of Idaho, the governor of the state of Idaho, the attorney general of the state of Idaho, and Idaho Power Company. As part of this agreement the parties agreed to support legislation for the commencement of an adjudication of the water rights of the Snake River basin.

In 1985 the Idaho Legislature enacted two bills – H.B. 70 and H.B. 267 (1985 Idaho Sess. Laws chs. 18, 118, pp. 27, 287) – which together constitute I.C. § 42-1406A. Section 1 of H.B. 70 enacted I.C. § 42-1406A (1) and (2).

H.B. 267 amended I.C. § 42-1406A by adding a new subparagraph (3). H.B. 267 read as follows:

CHAPTER 118
(H.B. No. 267)

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS IN THE SNAKE RIVER BASIN; AMENDING SECTION 42-1406A, IDAHO CODE, AS ENACTED BY HOUSE BILL NO. 70, FIRST REGULAR SESSION, FORTY-EIGHTH IDAHO LEGISLATURE TO PROVIDE INSTRUCTIONS TO THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES WHEN HE ADJUDICATES THE SNAKE RIVER BASIN FROM THE OREGON BORDER UPSTREAM; TO ALLOW THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO ADJUDICATE THE WATER RIGHTS OF THE MAIN STEM OF THE SNAKE RIVER WHICH FORMS THE BOUNDARY BETWEEN THE STATE OF IDAHO AND THE STATES OF OREGON AND WASHINGTON, AND TO INCLUDE WITHIN HIS PETITION FOR ADJUDICATION ANY ADJUDICATED TRIBUTARIES; AND TO PROHIBIT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES FROM READJUDICATING ANY TRIBUTARY OF THE SNAKE RIVER DOWNSTREAM WHICH PREVIOUSLY HAS BEEN ADJUDICATED UNLESS IT IS NECESSARY TO OBTAIN THE CONSENT OF THE UNITED STATES OR OTHER NECESSARY PARTIES.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-1406A, Idaho Code, as enacted by House Bill No. 70, First Regular Session, Forty-eight Idaho Legislature, be, and the same is hereby amended to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION – COMMENCEMENT. (1) Effective management in the public interest of waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined.

Therefore, the director of the department of water resources shall petition the district court to commence an adjudication witahin the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) The boundaries of the system within the state to be adjudicated;

(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system:

(b) Defines the boundaries of the system within the state to be adjudicated;

(c) Defines the classes of water users within the system and the boundaries of any hydrologic subbasins within the system for which proceedings may

advance separately pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(d) Defines any uses of water excluded for the adjudication proceedings;

the adjudication shall proceed in a manner provided under the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407, Idaho Code.

(3) In exercising his authority under subsection (1) of this section, the director of the department of water resources:

(a) Shall petition the district court to commence an adjudication of the water rights of all of the Snake River basin within the state of Idaho upstream from the point at which the Snake River leaves the state of Idaho and enters the state of Oregon in section 14, township 4 north, range 6 west, Boise Meridian; b) May petition the district court to commence an adjudication of the water rights of the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington. The director may include within his petition under this paragraph any unadjudicated tributaries. The director shall not include in the petition filed under this paragraph any adjudicated tributary unless the United States, or other parties whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 42 U.S.C. section 666.

1985 Idaho Sess. Laws, ch. 118, p. 287.

The legislative history of H.B. 267 is clear that by "any adjudicated tributary" the legislature intended to refer to the Boise, Payette, Weiser and Lehmi Rivers (the adjudicated tributaries). The record demonstrates that none of these adjudicated tributaries have been fully adjudicated

as to all water rights of the United States pursuant to the McCarran Amendment.

In 1987 the director of the Idaho department of water resources (the Director) filed a petition in the trial court "for the general adjudication *inter se* of all rights arising under state or federal law to the use of surface and ground waters from the Snake River basin water system and for the administration of such rights." In this petition the director alleged athat the trial court had jurisdiction of all claims of the United States under the McCarran Amendment. The McCarran Amendment states in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of the rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666.

The petition proposed the adjudication of the rights to the use of all surface and ground waters of the Snake River basin water system within the state of Idaho upstream from and including the Salmon River basin. The petition stated that the Director was unable to ascertain whether the United States refused to consent to the jurisdiction of the trial court if the adjudication did not include the Boise River basin and the Weiser River basin, both of which are tributaries to the portion of the mainstream of the Snake River upstream from the confluence of the Snake River and the Salmon River. The petition also included as part of the prayer for relief a request that

the trial court describe the boundaries of the water system to be adjudicated as contained in the petition "or as finally determined by the district fourt to be necessary to obtain the consent of the United States to the jurisdiction of the district court for the adjudication of the Snake River basin water system." By response to the petition the United States filed a special appearance for the purpose of contesting the jurisdiction of the trial court over the United States pursuant to the McCarran Amendment and relevant state law. In support of this special appearance the United States asserted that the petition did not meet the consent to suit provisions of the McCarran Amendment and also did not comport with the requirements of I.C. § 42-1406A. The United States asserted that none of the four adjudicated tributaries, including the Boise River and the Weiser River, had been finally or completely adjudicated insofar as the rights of the United States were concerned. The United States took the position that under the McCarran Amendment the adjudicated tributaries had to be included within the scope of the Snake River basin adjudication proposed by the petition in order to establish the jurisdiction of the trial court over the United States. Idaho Power objected to the boundaries of the adjudication proposed in the petition of the Director and asserted that the entire Snake River basin within the state of Idaho had to be included in the adjudication in order for the adjudication to come within the terms of the McCarran Amendment. Irrigation and water districts in the Boise River and Weiser River basins asserted that I.C. § 42-1406A(3) did not require the special consent of the United States in order to exclude the adjudicated tributaries from the Snake River basin for the

purposes of the adjudication, and that the exclusion of the Boise River and Weiser River basins from the adjudication would not destroy jurisdiction over the United States under the McCarran Amendment. Following a hearing, the trial court entered an order commencing the adjudication and included within the boundaries of the Snake River basin water system the four adjudicated tributaries, including the Boise River and Weiser River sub-basins. Five irrigation districts which draw their water from the Boise River and two water districts which use water from the Weiser River appealed the inclusion of the Boise River and Weiser River sub-basins in the commencement order. This Court has allowed two canal companies in the Twin Falls area to intervene in support of the inclusion of the Boise River and Weiser River sub-basins in the adjudications.

II.

IF THE LEGISLATURE HAD INTENDED TO ALLOW THE UNITED STATES TO DETERMINE THE BOUNDARIES OF THE ADJUDICATION BY ITS SPECIAL CONSENT TO THE EXCLUSION OF THE ADJUDICATED TRIBUTARIES, THAT WOULD HAVE BEEN AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

The state of Idaho contends that I.C. § 42-1406A(3) was intended by the legislature to allow the United States to determine whether the adjudicated tributaries would be included within the boundaries of the Snake River basin for the purpose of the adjudication. The appellant irrigation districts and water districts contend that the consent referred to in I.C. § 42-1406A(3) refers merely to

the consent given by Congress in the McCarran Amendment. The United States has not offered any special consent to the jurisdiction of the trial court beyond the consent enacted by Congress in the McCarran Amendment. Before reaching the question of what the McCarran Amendment requires in this case, we turn first to the argument that the legislature intended that the United States would have to give its special consent to the exclusion of the adjudicated tributaries. The legislative power of this state is vested in the legislature. Id. Const. art. 3, § 1. This Court has held that "[t]he legislature cannot delegate its authority to another government or agency in violation of our Constitution." *Idaho Savings & Loan Ass'n. v. Roden*, 82 Idaho 128, 134, 350 P.2d 225, 228-29 (1960). In *Idaho Savings & Loan Ass'n. v. Roden*, the statutes at issue required that Idaho savings and loan associations insure their accounts with the Federal Savings & Loan Insurance Corporation as a condition precedent to doing business in the state of Idaho, or to the continuation of doing business in the state of Idaho. In order to obtain this insurance a savings & loan association was "required to abide by and conform with rules and regulations of the Federal Home Loan Bank Board adopted after the enactment of the Idaho legislation, and to abide by and conform with any amendment to Title 4 of the Housing Act relating to insurance of accounts which may become effective after the date of the Idaho act." Id. at 134, 350 P.2d at 228.

The trial court held that these unconstitutional provisions were severable and that the balance of the statutes relating to the insurance of savings and loan associations were enforceable. On appeal this Court stated that "the

question to be resolved is whether or not the Legislature of the State of Idaho, contrary to the Idaho Constitution, Article 3, section 1, unlawfully delegated its authority to the federal government and an agency thereof." *Id.* In answering this question this Court held:

> Thus, it is demonstrated that the unconstitutional provisions delegating to the Congress and the Home Loan Bank Board the legislative power and function to make future laws and regulations governing appellant's business and its right to remain in business, are not severable from the provisions requiring appellant to obtain insurance of accounts by Federal Savings & Loan Insurance Corporation. The provisions requiring such insurance are therefore unconstitutional and void.

82 Idaho at 135, 350 P.2d at 229.

It is also a fundamental principle of constitutional law that "[w]hen a statute is susceptible to two constructions, one of which would render it invalid and the other would render it valid, the construction which sustains the statute must be adopted by the courts." Leonardson v. Moon, 92 Idaho 796, 806, 451 P.2d 542, 552 (1969). *See also* Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986). Applying these principles to the provisions of I.C. § 42-1406A(3)(b), we conclude that the legislature did not intend to require special future consent of the United States for the exclusion of the adjudicated tributaries from this adjudication. We construe the statute to refer to the existing consent given by Congress in the McCarran Amendment. To construe the statute as requiring special consent of the United States would lead us to the conclusion that the statute constituted an unlawful delegation of legislative authority in violation

of art. 3, § 1 of our constitution. Therefore, we construe I.C. § 42-1406A(3)(B) as it relates to the consent of the United States to the inclusion of "any adjudicated tributary" in this adjudication to refer to the consent contained in the McCarran Amendment and not to some special consent of the United States.

III.

THE McCARRAN AMENDMENT REQUIRES THE INCLUSION OF THE BOISE RIVER AND WEISER RIVER IN THIS ADJUDICATION.

The necessity for the inclusion of all tributaries of the Snake River in order to obtain jurisdiction over the United States is made clear by the legislative and judicial history of the McCarran Amendment. When the language that now comprises 42 U.S.C, § 666 was proposed in the United States Senate by Senator McCarran, the report accompanying the bill stated:

> The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of a river system of other source of for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit.
>
> . . . .
>
> It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated

such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, *and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties* to any court proceeding. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for benficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless congress has removed such immunity by statutory enactment, the bar of immunity from suits still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill . . . was introduced for the very purpose of correcting this Situation and the evils growing out of such immunity.

. . . .

Since it is clear that the States have the control of the water within their boundaries, *it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State,* if there is to be a proper administration of the water law as it has developed over the years.

S. Rep. No. 755, 82d Cong. 1st Sess. 2, 4-6 (1951). (Emphasis added.)

In correspondence with Senator Magnuson in 1951, Senator McCarran stated that the language now comprising the McCarran Amendment was "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream." *Id.* at 9.

In 1956 the 9th Circuit Court of Appeals referred to the type of adjudication required by the McCarran Amendment:

> The only proper method of adjudicating the rights on a stream, whether riparian or apporpriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the streams involved in another watershed in court at the same time.

People of State of California v. United States, 235 F.2d 647, 663 (9th Cir. 1956).

The next year the 5th Circuit Court of Appeals in discussing the type of suit to which the McCarran Amendment referred stated:

> The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal.

Miller v. Jennings, 243 F.2d 157, 159 (5th Cir. 1957).

Four years later the 9th Circuit again addressed the McCarran Amendment:

> There can be little doubt as to the type of suit congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a "general adjudication" of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.

State of California v. Rank, 293 F.2d 340,___ (9th Cir. 1961) *rev'd other grounds* sub nom. Dugan v. Rank, 372 U.S. 609, (1963).

In *Dugan v. Rank* the United States Supreme Court held that an action to enjoin officials of the Bureau of Reclamation from impounding water at a federal dam on the San Joaquin River was not the type of "general adjudication of 'all of the rights of various owners on a given stream,' " but that it was "a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials." 372 U.S. at 618 (citations omitted). In reaching this conclusion the court relied specifically on "the fact that all claimants to water rights along the river are not made parties." 372 U.S. at 618. Recently, the 9th Circuit has stated:

> The McCarran amendment . . . does not authorize private suits to decide priorities between the United States and particular claimants, only suits to adjudicate the rights of all claimants on a stream.

Metropolitan Water District of Southern California v. United States, 830 F.2d 139, 144 (9th Cir. 1987), (*Citing Dugan v. Rank*).

This history of the McCarran Amendment and the interpretations that the federal courts have given to it

convince us that in order for the United States to be subject to the jurisdiction of the trial court in the Snake River basin adjudication, the rights of all claimants on the Snake River and all of its tributaries within the state of Idaho must be included in the adjudication.

The irrigation districts and the water districts that have appealed the inclusion of the Boise River and Weiser River in this adjudication contend that other court decisions interpreting the McCarran Amendment indicate that not all tributaries of a river system within a state must be included in a general adjudication under the McCarran Amendment. They rely heavily upon two decisions of the United States Supreme Court concerning the adjudication of water rights in Colorado. United States v. District Court, County of Eagle, 401 U.S. 520 (1971) and United States v. District Court, Water Division No. 5, Colorado, 401 U.S. 527 (1971). Neither of these cases is in conflict with our decision here. The opinions in those cases must be read in light of the system of adjudication of water rights that is unique to Colorado. In the decision of the Colorado Supreme Court that was reviewed by the United States Supreme Court in *United States v. District Court, County of Eagle, Colorado,* the Colorado court described this unique system:

> The following are considered as the "appropriation" states woth respect to water adjudications: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Utah, Washington and Wyoming. With the exception of Colorado all of the appropriation states have a state-wide system of adjudicating priorities or issuing permits for the use of water. Until 1969 Colorado throughout its history has been divided into water

districts and adjudicated priorities have been determined within each district. In 1969 the General Assembly of Colorado adopted Senate Bill 81 amending C.R.S. 1963, 148-21-1 *et. seq.* which consolidates the 70 water districts of the state into seven divisions, each of which embraces an entire river drainage area within the state.

. . . .

As the Government points out, priorities to the use of water are established by decrees of our district courts in the several water districts. Under our statutes there can be an original adjudication culminating in a decree fixing these priorities. Thereafter there can be a supplemental adjudication to establish priorities to the use of water not decreed in the original proceedings. There is no limit to the number of successive supplementary proceedings that may be had. The earliest priority granted in any supplemental adjudication must be later than the last priority established by the next preceding adjudication. (Citation omitted.) Those appropriating water within the water district involved who were not served personally or by mail with notice of the proceedings are barred from attacking a decree after the lapse of two years. Those outside the water district may bring an action to adjust priority rights as between different districts within four years from the time of rendition of a decree having effect thereon. (Citation omitted.) In practically all of the districts in Colorado, prior to the adoption of the McCarran amendment in 1952, there had been not only original adjudications but supplementary adjudications.

United States v. District Court in and for County of Eagle, 458 P.2d 760, 762-63 (Colo. 1969), *aff'd*, 401 U.S. 520 (1971).

While it is true that the United States Supreme Court agreed with the Colorado Supreme Court that the Eagle

River, a tributary of the Colorado River, could be adjudicated under the McCarran Amendment, even though other parts of the Colorado River system within Colorado were not adjudicated in the same proceeding, this decision must be read in light of the unique system of water adjudication that exists in Colorado. In *United States v. District Court, Water Division No. 5, Colorado,* the Supreme Court clarified why the adjudication by district or division under the unique Colorado system qualified as a "general adjudication" under the McCarran Amendment:

> The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality;. . . .

401 U.S. at 530.

Even though the Gunnison River was excluded from the adjudication in water division 5, it was included in the adjudication of water division 4. Colo. Rev. Stat. Annot. § 37-92-201(1)(d) (1973). Thus, the Gunnison River was adjudicated under the McCarran Amendment as part of Colorado's unique system of determining water rights. When read in the context of the system of adjudication in Colorado, neither *Eagle County* nor *Water Division No. 5* would support the exclusion of the Boise River or the Weiser River from this adjudication.

We also reject the argument of the appellant irrigation and water districts that McCarran Amendment jurisdiction would exist if the Boise River and Weiser River sub-basins were excluded, because the main stem of the Snake River which forms the boundary between Idaho and Oregon and Washington is covered by the portion of the McCarran Amendment that refers to "other source.

The source of the water in the main stem of the Snake River is the river system. The term "other source" refers to sources other than a river system, such as lakes or ground waters. It would destroy the intent of the McCarran Amendment to allow a river system to be fragmented into separate sources in order to obtain jurisdiction over the United States.

IV.

CONCLUSION.

We conclude that I.C. § 42-1406A requires that the adjudication of the Snake River basin be within the terms of the McCarran Amendment. The McCarran Amendment requires the adjudication of the rights of all those who use the water of a river system within a state, including those who use the water of tributaries.

We affirm the decision of the trial court requiring the Boise River and Weiser River sub-basins to be included in this adjudication.

Costs to respondents. No attorney fees were requested.

SHEPARD, C. J., BAKES, and HUNTLEY, JJ., concur.

HUNTLEY, J. concurring specially.

I concur in the majority opinion as to Part I, III and IV and in the result as to Part II.

As to Part II, I do not see an "unlawful delegation of legislative" authority question at all – it is somewhat of

an example of a case being simple or complex depending upon how one frames the issue.

I see the issue as being not one of the Idaho Legislature delegating authority, but rather it is:

> It being granted the United States has immunity from any suit, may it waive that immmunity upon the condition that it will subject itself only to basin-wide adjudications?

The answer is an easy "yes" – if parties adjudicating a case in Idaho do not wish to make their action comprehensive, they are certainly free to litigate to their heart's content if they mind not that the extent of federal rights will not be adjudicated and the decree will be non-binding as to federal and Indian water rights.

The federal stance makes a lot of sense – why should taxpayer's money and court resources be wasted on piece-meal litigation which leaves the validity of water decrees subject to later adjudication as against omitted parties in the river basin?

Accordingly, I see the "state's rights" or unconstitutional delegation issues as merely diversionary, wasteful red-herrings which have been permitted to unnecessarily delay this litigation.

BISTLINE, J., dissenting.

There is no reason at this moment, for not being brief. The case before us is of considerable moment, and no matter how this Court's opinion goes, there will be a petition or petitions for rehearing.

The claim of the irrigation districts and the water districts, and the user members thereof, as I understand

the claim to be, is not that they assert any new water rights, but simply challenge the right of the state of Idaho in the person of its legislature to cause to be relitigated that which has been litigated, or to readjudicate that which has been adjudicated and gone to a final judgment.

It has been held that a water right is a property right. An adjudicated water right is a highly perfected water right. It is the decree or judgment of a state district court, and once wholly final is subject to no attack other than that it was fraudulently obtained. The McCarran Report partially reprinted in the majority opinion, pages 12-13, acknowledges that "the State courts are vested with the jurisdiction necessary and proper . . . for the administration of and adjudication of water rights under state laws." This has always been my understanding. I agree with the Report in the statement that *in practically every case all water users on a stream are interested parties to any court proceeding*. I am not persuaded that all such water users *are necessary parties* in all cases, in the sense that the action cannot proceed without a state court (here, Idaho) gaining jurisdiction over them. A water user having a valid state judicial decree in his pocket, meaning one that flows from a valid court decree, will be interested,[1] of course, but not necessarily a necessary party. Else, why, one might ask, what has he gained by having once successfully litigated, if into litigation once again he will be forced?

The pertinent portion of the McCarran Report, page 12, as I comprehend its language, is that it has in mind

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[1] In the common sense of the word, *i.e.*, attentive, curious, but not in the sense of being affected by.

only those water users claiming a water right by reason of the ownership of the United States or any of its departments who seek to don the cloak of immunity which does shield the United States of America. The McCarran Act itself shreds that assumed cloak.

I take no umbrage with the final paragraph of the Report which is reprinted in the majority opinion, page 13, *i.e.*, "that it is essential that each and every owner *along a given water course,* including the United States, must be amenable to the law of the State, . . . " My understanding that prior litigation on the tributaries of the Snake River afforded all owners on those rivers or streams the opportunity to be involved. If the opportunity to litigate was present but eschewed, the litigation is nevertheless as final as to those who did not chose to participate as to those who did so. Such an action was basically *in rem.*

The McCarran Act undoubtedly is, as Justice Johnson has written, a Congressional waiver of otherwise unassailable federal immunity as to actions for stream adjudications brought in Idaho courts. The so-called "special appearance" of the United States on the part of the United States District Attorney for Idaho is in my view of no consequence. The law heretofore has been that the United States can only be sued by its consent, and if district attorneys are freely empowered to give or withhold that consent, I am woefully ignorant of that change. As for my part, until I become better informed, the United States of America, and each and all of its departments, agencies, bureaus, and whatever, are in court because of the McCarran Act, or, conversely, are not in court because of that Act's inapplicability, which I much

doubt, and on which issue I agree with Justice Johnson's opinion.

But, accepting that the United States may be subject to jurisdiction of an Idaho state district court, I am left wondering how that conclusion necessitates a holding that water right users possessing valid judgments or decrees and, probably valid water rights of any degree, can be brought into this action against their will.

As mentioned above, it can be said confidently without citation that an adjudicated water right is a property right. Like any other property, it can be forfeited or abandoned, but there is no such claim here. Like any other property, it can be taken by such authorities as have the power of eminent domain, but a just compensation must be paid therefor.

Although feeling not obliged to search for authority in that vein, a study of Justice Johnson's opinion reassures me when I read on page 14 of the slip opinion his ten line excerpt from California v. Rank, 293 F.2d 340, in which litigation the state of California was positioned as is Idaho in this litigation, *i.e.*, the defendant. The plaintiffs in that action were owners of the beneficial use of the river of the San Joaquin River below the dam. The United States over its protest was joined as a necessary party defendant.

What I make out of reading that case as it definitely has application to the case at hand, is that " . . . the United States has the power to acquire the rights of these plaintiffs through exercise of eminent domain." *Rank*, 293, F.2d at 354. And, "[w]hile a state can bestow property rights on its citizens which the United States must

respect, it cannot take from the United States the power to acquire those rights." *Id.* at 354. Presently, the United States of America is not attempting to seize or otherwise appropriate any property rights. In fact, all that we see is the claim of the United States District Attorney, Idaho, that the United States is not in court.

I remain unable to see the grounds upon which the state of Idaho can force the owners of valid water rights to litigate that which is *res judicata*. Nor do I understand how the legislature can purport to authorize such. The legislature is prohibited by two constitutions from impairing the obligation of contract, and in my humble view, an adjudicated water right, especially one with whiskers, is on a higher plane than a contract.

Until better informed, I must respectfully dissent, and am deeply concerned with the plight which the state of Idaho has brought down on the innocent owners of water rights in Idaho. Those water rights are not free-hanging merchandise like tires and beer, but are appurtenant to lands which lands for the most part would be greatly devalued without water rights. To make such owners parties to this litigation is tantamount to an impermissible restraint on the right of free alienability of land.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System	Case No. 39576
The State of Idaho, *ex rel.* R. Keith Higginson in his official capacity as director of the Idaho Department of Water Resources, Petitioner, vs. The United States; the State of Idaho; and all claimants to the use of water from the Snake River Basin Water System, Defendants.	MEMORANDUM OPINION ON COMMENCEMENT OF ADJUDICATION

I.C. Sec. 42-1406A (Supp. 1987)[1] requires the director of the Idaho Department of Water Resources (the director) to petition this court to commence an adjudication,

[1] I.C. Sec. 42-1460A (Supp. 1987) reads as follows:

Snake River basin adjudication – Commencement. – (1) Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water

(Continued on following page)

within the terms of the McCarran amendment, of the water rights of the Snake River basin. On June 17, 1987,

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(Continued from previous page)

resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) The boundaries of the system within the state to be adjudicated;

(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system;

(b) Defines the boundaries of the system within the state to be adjudicated;

(c) Defines the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(d) Defines any uses of water excluded from the adjudication proceedings; the adjudication shall proceed in the manner provided under the provisions of chapter 14, title

(Continued on following page)

the director filed the petition, describing: (1) The boundaries within the state to be adjudicated, (2) any class of water users and the boundaries of any hydrologic subbasins within the system for which the director intends to proceed separately, and (3) the uses of water within the system that are recommended to be excluded from the adjudication.

On June 25, 1987, this court ordered that a commencement hearing, pursuant to I.C. Sec. 42-1408 (Supp. 1987), be held on September 8, 1987, for the purpose of

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42, Idaho Code, with the exception of sections 42-1406 and 42-1407, Idaho Code.

(3) In exercising his authority under subsection (1) of this section, the director of the department of water resources:

(a) Shall petition the district court to commence an adjudication of the water rights of all of the Snake River basin within the state of Idaho upstream from the point at which the Snake River leaves the state of Idaho and enters the state of Oregon in section 14, township 4 north, range 6 west, Boise Meridian;

(b) May petition the district court to commence an adjudication of the water rights of the main stem of the Snake River which forms the boundary between the state of Idaho and states of Oregon and Washington. The director may include within his petition under this paragraph any unadjudicated tributaries. The director shall not include in the petition filed under this paragraph any adjudicated tributary unless the United States, or other parties whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. section 666.

determining those matters described in the petition. Procedures for appearing, presenting evidence or making statements or legal arguments were also set forth in the order setting commencement hearing. On September 8, 1987, the commencement hearing was held and all parties were given an opportunity to address those matters described in the petition.

I.C. Sec. 42-1406A(2) requires this court to issue an order which does four things. First, the order must authorize the director to commence an investigation and determination of the various water rights to be adjudicated within the system. Second, the order must define the boundaries of the adjudication. Third, the order must define the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately, pursuant to I.C. Secs. 42-1408 through 42-1414. Finally, the commencement order must define any uses of water excluded from the adjudication. This opinion addresses each of the above requirements and requests the director to submit a proposed order in conformance with the opinion.

I. BOUNDARIES OF THE SNAKE RIVER BASIN ADJUDICATION.

The boundaries of the Snake River basin adjudication must be established in the commencement order. The Idaho legislature has determined that it is in the public interest that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water of the Snake River basin be

made. The director is, therefore, to petition this court to commence an adjudication of the Snake River basin within the terms of the McCarran amendment. I.C. Sec. 42-1406A(1). In petitioning the district court the director *must* include in the adjudication all of the Snake River basin within Idaho upstream from the point where the Snake River leaves Idaho and enters Oregon (the upper Snake River basin). The director *may* include in the petition the remainder of the Snake River within Idaho, including any unadjudicated tributaries, but may not include any adjudicated tributaries unless the United States or other parties whose consent is necessary refuse to consent to the jurisdiction of this court to adjudicate all federal or Indian water rights pursuant to the McCarran amendment. I.C. Sec. 42-1406A(3).

Two boundary issues have been raised by the parties at the commencement hearing. First, may the lower Snake River basin be excluded from the adjudication? Second, may any adjudicated tributaries of the Snake River basin be excluded from the adjudication? Finally, it is noted that no objection has been lodged to the inclusion in the petition of the upper Snake River basin, and it, therefore, need not be discussed further herein.

A. LOWER SNAKE RIVER BASIN.

1. State statute.

As set forth above, I.C. Sec. 42-1406A(3)(b) provides that the director may include in the petition the portion of the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington, including any unadjudicated

tributaries. Setting aside the question of any adjudicated tributaries for now, the director has proposed in his petition to include most, but not all, of the main stem which forms the boundary between the state of Idaho and the states of Oregon and Washington. The director has proposed to exclude the portion of the main stem downstream from the confluence of the Snake River and the Salmon River, hereinafter referred to as the lower Snake River basin. No portion of the main stem which forms the boundary between Idaho and Washington is included in the petition. The primary tributary in the lower Snake River basin is the Clearwater River.

The director asserts that I.C. Sec. 42-1406A(3)(b) provides him with broad discretion in determining how much, if any, of the main stem which forms the boundary between the state of Idaho ~~and the~~ states of Oregon and Washington to include in the adjudication. The director further asserts that excluding the lower Snake River basin does not deprive this court of jurisdiction over the United States pursuant to the McCarran amendment.

Several parties have objected to, or commented on, the proposed exclusion of the lower Snake River basin. The United States agrees with the director's assertion the the McCarran amendment does not require the adjudication to encompass the entire Snake River basin. According to the United States, in order to satisfy the McCarran amendment, an adjudication need not include the entire river system, as long as the boundaries of the adjudication are clearly defined and make hydrologic sense. The United States maintains that it is up to the state initially to determine the exterior geographic boundaries of the adjudication, and as long as all the water rights within

those boundaries are included the adjudication satisfies the requirements of the McCarran amendment.

Idaho Power Company maintains that in order to obtain jurisdiction over federal rights pursuant to the McCarran amendment, all rights to the entire Snake River basin within the state of Idaho must be adjudicated. According to Idaho Power Company, however, one need not reach the question of McCarran amendment jurisdiction, because even under the state statute all rights to the entire Snake River basin must be included. Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District have joined in Idaho Power Company's objection to the exclusion of the lower Snake River basin.

Finally, the Boise-Kuna, Nampa and Meridian, New York, Wilder and Big Bend irrigation districts (the "districts") maintain that I.C. Sec. 42-1460A(3)(b) does not give the director discretion to include only a portion of the main stem of the Snake River. According to the districts, the director must include all or none of the main stem which forms the boundary between the state of Idaho and the states of Oregon and Washington.

The issue of whether the lower Snake River basin may be excluded from the Snake River basin adjudication is answered by I.C. Sec. 42-1460A and the McCarran amendment, 43 U.S.C. section 666 (1986), and the legislative history of those statutes. As noted earlier, I.C. Sec. 42-1406A(1) provides that:

> Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and

> ground water from that system be determined. Therefore, the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding.

Two conclusions are clear from I.C. Sec. 42-1406A(1). First, the legislature decided that it is in the public interest that a *comprehensive determination* be made of the nature, extent and priority of the rights of *all users* of surface and ground water of the Snake River basin. Second, the Snake River basin adjudication is to be commenced *within the terms of the McCarran amendment.*

Less than clear, however, is the extent of discretion given to the director by I.C. Sec. 42-1406A(3) (b) to include the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington. While it is clear from that section that the director may include any unadjudicated tributaries, it is not clear whether the director must include all or none of this portion of the Snake River, or whether he may include only some parts and exclude others. On the issue of whether the lower Snake River basin may be excluded from the adjudication, therefore, I.C. Sec. 42-1406A is ambiguous.

The primary goal in statutory construction is to ascertain and give effect to the legislative intent. *Carpenter v. Twin Falls County,* 107 Idaho 575, 691 P.2d 1190 (1984); *Umphrey v. Sprinkel,* 106 Idaho 700, 682 P.2d 1247 (1983); *Gumprecht v. City of Coeur d'Alene,* 104 Idaho 615, 661 P.2d 1214 (1983). Statutes must be construed as a

whole without separating one provision from another. *Idaho Power C. v. Idaho Public Utilities Commission,* 102 Idaho 774, 639 P.2d 442 (1981); *First American Title Co. of Idaho, Inc. v. Clark,* 99 Idaho 10, 576 P.2d 581 (1978). In construing statutes, all sections of applicable statutes should be considered and construed together to determine the intent of legislature, and it is incumbent upon the court to give statute an interpretation that will not in effect nullify it. *Magnuson v. Idaho State Tax Commission, 97 Idaho 917, 556 P.2d 1197 (1976). One method of discerning legislative intent behind a statute is to examine the purposes of the statute and its structure as a whole in an attempt to discern the legislative intent. Leliefeld v. Johnson,* 104 Idaho 357, 659 P.2d 111 (1983).

Where a statute is clear and unambiguous, the expressed intent of the legislature must be given effect and there is no occasion for construction. *Intermountain Health Care, Inc. v. Board of County Commissioners of Madison County,* 109 Idaho 685, 710 P.2d 595 (1985); *Ottesen on Behalf of Edwards v. Board of County Commissioners of Madison County,* 107 Idaho 1099, 695 P.2d 1238. Where a statute is ambiguous or capable of different constructions, courts are empowered to go outside the language of the statute itself to ascertain and effectuate the legislative intent. *Beasley v. Lee,* 111 Idaho 115, 721 P.2d 215 (1986); *St. Benedict's Hospital v. Twin Falls County,* 107 Idaho 143, 686 P.2d 88 (1984).

The legislative intent of a statute may be inferred on grounds of policy or reasonableness, *Black v. Reynolds,* 109 Idaho 277, 707 P.2d 388 (1985), or may be discerned from the occasion and necessity of the law, from the mischief felt and the remedy in view. *Bastian v. City of Twin Falls,*

104 Idaho 307, 658 P.2d 978 (Ct. App. 1983). Stated policy grounds of a statute may be utilized to determine the meaning of the statute. *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 615 (1981) *cert. denied*, 102 S.Ct. 2927, 457 U.S. 1116, 73 L.Ed.2d 1327, *reh'q denied*, 103 S.Ct. 15, 458 U.S. 1131, 73 L.Ed.2d 1402. Finally, if the language of a statute is ambiguous, the court must consider social and economic results which would be effectuated by the decision on the meaning of the statute. *Smith v. Department of Employment*, 100 Idaho 520, 602 P.2d 18 (1979). Because I.C. 42-1406A is ambiguous, the above factors will be considered in determining whether the lower Snake River basin may be excluded from the adjudication.

Dealing first with the purposes of I.C. Sec. 42-1406A, it should be noted that the statute was enacted in two stages. First, I.C. Sec. 42-1406A(1) and (2) were enacted as House Bill No. 70.[2] Second, I.C. Sec. 42-1406A(3) was enacted as House Bill No. 267.[3] The statement of purpose to House Bill No. 70 provides as follows:

> This legislation calls for a general adjudication of the Snake River Basin. This adjudication would include all tributary regions above Murphy gage and as much of the remainder of the basin as is necessary to obtain U.S. consent to include all federal claims in the adjudication under the terms of the McCarran Amendment. The legislation further sets a schedule of claim fees to be paid when water right holders file their claim in the district court. These claim fees would be deposited into a water resource adjudication account, a dedicated fund created by this act.

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[2] H.B. No. 70, 48th Leg., 1985 Idaho Sess. Laws 27.

[3] H.B. No. 267, 48th Leg., 1985 Idaho Sess. Laws 286.

The statement of purpose to House Bill No. 267 provides as follows: "The purpose of this legislation is to delineate for the purposes of a river system definition as required by the McCarran Amendment concerning federal water law, that portion of the Snake River lying within the borders of Idaho." The purpose of I.C. Sec. 42-1406A is, therefore, to provide for a general adjudication of the Snake River basin, including all tributary regions above Murphy gage and as much of the remainder of the basin as is necessary to obtain U.S. consent under the terms of the McCarran amendment. I.C. Sec. 42-1406A(3) sought to define that portion of the Snake River necessary for McCarran amendment jurisdiction.

The problems sought to be remedied by I.C. Sec. 42-1406A were identified in *Idaho Power Company v. State*, 104 Idaho 575, 661 P.2d 741 (1983), and have been the subject of much negotiation and legislative compromise. As suggested in *Idaho Power Company v. State*, the broad issue in the Snake River basin is the resolution of competing claims to water rights in the system between power generation, industrial, agricultural, recreational and other users. *Id.*, 104 Idaho at 578, 661 P.2d at 744. The Snake River basin adjudication arose out of the Swan Falls dispute and an integral part of the Swan Falls agreement entered into by the Idaho Power Company and the state is that both parties agreed to "a general adjudication of the Snake River basin," described as "a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system." Swan Falls Agreement, p. 3. Other problems associated with the water rights to the Snake River basin include unclear and insecure water rights, inefficient use

of water resources, lack of transferability of water rights, competing state and federal claims, and the lack of a plan for future water development.

Implementing the Snake River basin adjudication, however, required legislative action and not all members of the Idaho legislature agreed that a comprehensive determination of the entire Snake River was necessary. A review of the legislative history of I.C. Sec. 42-1406A[4] reviews three important facts. First, representative of water users in the Boise, Payette, Weiser and Lemhi River basins opposed adjudication of the Snake River basin downstream from Adrian, Oregon, on the ground that these basins had already been, or currently were being adjudicated. Second, representatives of the state, Idaho Power Company, the Shoshone Bannock Indian tribes and other water users opposed limiting the adjudication to water rights upstream from Adrian, Oregon, on the ground that a more comprehensive adjudication was necessary to resolve the competing claims to water rights in the Snake River basin. Finally, the legislative history and the statute itself reveal that the Idaho legislature was unable to come to a dispositive resolution concerning the exact scope of the ajudication. While the adjudicated tributaries, and not the lower Snake River basin, were the

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[4] The legislative history for the Snake River basin adjudication, H.B. 70 and 267, can be found in the following documents: Minutes of the House Resources and Conservation Committee, Jan. 17 and 21, 1985, and Feb. 1, 19 and 25, 1985; Minutes of the public hearing before the House Resources and Conservation Committee held Jan. 31, 1985; and Minutes of the Senate Resource and Environment Committee, Feb. 11 and 15, 1985, and March 8, 1985.

primary focus of the boundary controversy, it is clear that the compromise reached in the legislature on both of those issues is stated in the purpose of the legislation: that is to include as much of the Snake River basin as is necessary to obtain jurisdiction over all federal or Indian water rights pursuant to the McCarran amendment.

The legislature was unable to decide whether the lower Snake River basin or the adjudicated tributaries should be included or excluded in the adjudication, and, therefore, left that decision to the district court hearing the adjudication. It is clear, however, that the lower Snake River basin and the adjudicated tributaries must be included in the Snake River basin adjudication if doing so is necessary to obtain jurisdiction over the federal government or other parties who possess or assert water rights within the basin. The requirements of the McCarran Amendment must, therefore, be examined to determine whether the lower Snake River basin may be excluded from the adjudication. After an examination of the McCarran amendment, its legislative history and cases interpreting it, this court will return to a discussion of the policy grounds and social and economic factors to be considered in deciding whether the lower Snake River basin may be excluded.

2. McCarran Amendment.

The McCarran amendment[5] gives consent to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or

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[5] The McCarran amendment, 43 U.S.C.A. Sec. 666 (1986) reads as follows: Suits for adjudication of water rights.

(Continued on following page)

other source, where it appears that the U.S. is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange or otherwise, and the United States is a necessary party to such a suit. It is undisputed that the United States is the owner of or is in the process of acquiring numerous water

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(Continued from previous page)

(a) Joinder of United States as defendant; costs

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit. The United States when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* that no judgment for costs shall be entered against the United States in any such suit. (Emphasis in original.)

(b) Service of summons.

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by state.

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of states to the use of the water of any interstate stream.

rights in the Snake River basin. Furthermore, the United States is a necessary party to any general adjudication of the Snake River basin. Full relief cannot be granted to the parties to a general adjudication of the Snake River basin absent joinder of the United States.

The legislative history of the McCarran amendment provides some insight as to the type of adjudication for which Congress granted consent to join the United States as a defendant. In a letter made a part of the senate report, Senator McCarran stated that the legislation was:

> [N]ot intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S. Rep. No. 755, 82nd Cong., 1st Sess. 9 (1951).

The legislative history also provides that:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or others of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water

> users who are amendable to and bound by the decrees and orders of State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the state court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

S. Rep. No. 755, 82nd Cong., 1st Sess. 4-5 (1951).

Senator McCarran also explained the purpose of the legislation as follows:

> It has been under these State laws that the water rights of the owners on a given stream have been adjudicated. Under the laws of many States, in order that an adjudication of the water rights of the stream may be had, it is necessary to join all the parties owning or claiming to own any rights to the stream. If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill, and confusion results.
>
> The necessity that all owners or claimants of water rights on a given stream be joined in a suit for the adjudication of water rights is conceded. . . . I direct attention to this point to show that the Department of Justice admits that in order to get a proper and complete adjudication of the water rights of a given stream or water source, it is necessary to join all of the parties having or claiming to have an interest in the waters of said stream.

97 Cong. Rec. 12948 (1951).

A review of the decisions by the United States Supreme Court on the meaning of an "adjudication of rights to the use of water of a river system or other source" also sheds light on the type of adjudication for which Congress granted consent to join the United States as a party. In *Dugan v. Rank*, 83 S.Ct. 999, 372 U.S. 609 (1963), an injunctive suit was filed against the United States to prevent the storing and diverting of water at the Friant Dam in California. The United States argued that it had not consented to jurisdiction of the court. Justice Clark described the case as "a private suit to determine water rights solely between the respondents and the United States and local Reclamation Bureau officials." *Id.*, 83 S.Ct. at 1005, 372 U.S. at 618. The court also noted that "all of the claimants to water rights along the river [were] not made parties, no relief [was] either asked or granted as between claimants, nor [were] priorities sought to be established as to the appropriative and prescriptive rights asserted." *Id.*, 83 S.Ct. at 1005, 372 U.S. at 618-619. Based on the above, the court held that the injunctive suit was not "a case involving a *general* adjudication of 'all of the rights of various owners of a given stream.'" (Emphasis in original, citation omitted.) *Id.*, 83 S.Ct. at 1005, 372 U.S. at 618. *Dugan v. Rank*, therefore, stands for the proposition that in order to obtain McCarran amendment jurisdiction over the United States, the adjudication must be a general adjudication of all the rights of various owners on a given stream.

United States v. District Court in and for County of Eagle (Eagle County, 91 S.Ct. 998, 401 U.S. 520 (1971) involved a supplemental water adjudication in the Colorado courts. After being served with a notice to file a statement of

claim and to appear in regard to all water rights owned or claimed, the United States moved to be dismissed as a party, asserting that the McCarran amendment did not constitute consent to have adjudicated in a state court the reserved water rights of the United States. The court, finding that the McCarran amendment applies to appropriated, riparian and reserved rights, stated several legal and factual conclusions. First, the court found that the Eagle River and its tributaries were a "river system" within the meaning of the McCarran amendment. *Id.*, 91 S.Ct. at 1001, 401 U.S. at 523. Second, the court held that "'river system' must be read as embracing a river system within the particular State's jurisdiction." *Id.*, 91 S.Ct. at 1001, 401 U.S. at 523. Finally, citing *Dugan v. Rank* and the legislative history of the McCarran amendment, the court found that the supplemental adjudication of the Eagle River and its tributaries involved "the whole community of claims" and, hence, was a general adjudication within the terms of the McCarran amendment. *Id.*, 91 S.Ct. 1002, 401 U.S. at 524-525.

United States v. District Court in and for Water Division No. 5 (Water Division No. 5), 91 S.Ct. 1003, 401 U.S. 527 (1971), decided the same day as *Eagle County*, involved the adjudication of water rights affecting "'all lands in the state of Colorado in the drainage basins of the Colorado River and all of its tributaries arising within Colorado, with the exception of the Gunnison River,' which includes the area of the Eagle River." (Citation omitted.) *Id.*, 91 S.Ct. at 527, 401 U.S. at 528. The area covered in *Water Division No. 5* involved vastly more extensive water rights than the *Eagle County* case, including numerous federal water rights. The court incorporated its holding in

Eagle County that federal reserved water rights come within the scope of the McCarran amendment. On the issue of whether the statute in question involved a general adjudication, the court stated as follows:

> It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referees determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. . . .
>
> It is argued from these premises that the proceeding does not constitute a general adjudication which 43 U.S.C. Sec. 666 contemplated. As we said in the *Eagle County* case, the words "general adjudication" were used in *Dugan v. Rank* (citation omitted) to indicate that 43 U.S.C. Sec. 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusive of the totality; and as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review.

Water Division No. 5, therefore, affirms *Eagle County* and, in addition, holds that a general adjudication under the McCarran amendment may proceed month by month as long as all claims are reached eventually.

The legislative history of the McCarran amendment and the decisions by the United States Supreme Court on the meaning of "the adjudication of rights to the use of water of a river system or other source" provide the

following requirements or criteria as necessary in order to obtain jurisdiction over the United States pursuant to the McCarran amendment.[6] First, the adjudication must be a general adjudication of all the rights of various owners on a given stream. Second, the adjudication may proceed month by month as long as it reachs all claims eventually. Third, all rights, including appropriated, riparian and reserved rights, come within the purview of the McCarran amendment. Fourth, a river system may include a single river and its tributaries. Finally, a river system must be read as embracing a river system within the particular state's jurisdiction.

Applying the above principles to the Snake River basin adjudication leaves this court with the conclusion that the lower Snake River basin must be included in order to obtain complete jurisdiction over all federal water rights. First, the Snake River within the boundaries of Idaho is the type of river system envisioned in the drafting of the McCarran amendment. The purpose of the McCarran amendment is to allow the states to obtain

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[6] Other courts have considered other aspects of the McCarran amendment. *See, e.g., Arizona v. San Carlos Apache Tribe of Arizona,* 103 S.Ct. 3201, 463 U.S. 545, 77 L.Ed.2d 837 (1983); *Colorado River Water Conservation District v. United States,* 96 S.Ct. 1236, 424 U.S. 800, 47 L.Ed.2d 483 (1976); *United States v. Bluewater-Toltec Irrigation District,* 580 F.Supp. 1434 (D. N.M. 1984); *Miller v. Jennings,* 243 F.2d 157 (5th Cir. 1957); *State v. Confederated Salish and Kootenai Tribes,* 712 P.2d 754 (S.Ct. Mont. 1985); *State ex rel. Reynolds v. Lewis,* 88 N.M. 636, 545 P.2d 1014 (1976); *Avondale Irrigation District v. North Idaho Properties, Inc.,* 96 Idaho 1, 523 P.2d 818 (1974). *See also,* White, McCarran Amendment Adjudications-Problems, Solutions, Alternatives, 22 Land & Water L. Rev. 619 (1987).

jurisdiction over federal water rights when adjudicating a given stream. Federal water rights exist in all parts of the Snake River basin, including the lower Snake River basin. To allow the present adjudication to continue without considering federal and all water rights in the lower Snake River basin would result in bifurcated proceedings, one of the evils sought to be avoided by the McCurran amendment.

Eagle County cannot be read for the proposition that states have complete discretion in deciding the exterior boundaries of an adjudication and as long as all rights are included in those boundaries, jurisdiction over the federal rights is obtained pursuant to the McCarran amendment. Taken to its extreme, this proposition would result in the type of piecemeal litigation to which the McCarran amendment was directed. It should also be noted that *Eagle County* and *Water Division No. 5* were decided on the same day, and between the two adjudications involved in those cases, the entire Colorado River basin was the subject of an extensive adjudication with all federal rights involved pursuant to the McCarran amendment. While the McCarran amendment, its legislative history, and cases interpreting provide very little specific guidance, this court believes that excluding the lower Snake River basin from the present adjudication will only frustrate the purpose of the amendment allowing states to adjudicate state and federal water rights on a river system or other source. Once a state has chosen to adjudicate a particular river and its tributaries, be it the Eagle River or the Snake River, the entire river and its tributaries must be included within the adjudication or jurisdiction over the federal and Indian water rights becomes

insecure. Only by considering the entire Snake River basin can the state accurately decree federal and Indian water rights to that system.

Returning now to I.C. Sec. 42-1406A, it is also clear that the lower Snake River basin must be included in the adjudication. As stated earlier, neither the statute nor the legislative history is clear on this point. An examination of the policy grounds of the statute and the social and economic results which would be effectuated by the decision on the meaning of the statute, however, leaves this court with the inescapable conclusion that the lower Snake River basin must be included in the adjudication. The purpose of the statute is to provide for a general adjudication of the Snake River basin. The legislature has decided that it is in the public interest that a *comprehensive determination* be made of the nature, extent and priority of the rights of *all users of the surface and ground water of the Snake River basin*. This purpose will be frustrated if a portion of the basin is not adjudicated.

The social benefits of an adjudication of the entire Snake River basin are numerous, and include more clearly defined water rights, security against future challenges to a water right, increased efficiency in the use of water resources, increased transferability of land and water rights, a resolution to competing state and federal claims, and a guideline for future water development. Unless the entire Snake River basin is included in the adjudication, these goals may not be realized. While it may be more costly to include the lower Snake River basin in the adjudication, the benefits of a well-organized and comprehensive determination of the entire basin far outweigh the economic costs. Only by including the

lower Snake River basin can the ongoing conflict between upstream and downstream users be resolved.

The legislature has determined that a comprehensive adjudication, pursuant to the McCarran amendment, of all rights on the Snake River basin be undertaken. This court sees no reason to frustrate the intent of the legislature in providing for a comprehensive adjudication by excluding a major portion of the Snake River basin. Furthermore, the McCarran amendment requires that the lower Snake river basin be included in order to securely obtain jurisdiction over federal and Indian water rights in the basin. I.C. Sec. 42-1406A and the McCarran amendment must be read together. Both statutes, their purpose and policies, and the social and economic factors involved in a general adjudication of the Snake River basin dictate that the lower Snake River basin must be included in the adjudication.

B. ADJUDICATED TRIBUTARIES.

I.C. Sec. 42-1406A(3) (b) provides that in exercising his authority to petition this court commence an adjudication, the director . . . :

> [S]hall not include in the petition filed under this paragraph any adjudicated tributary unless the United States, or other parties who consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. Section 666.

The director's petition has proposed to exclude four tributary sub-basins from the adjudication – the Boise, Payette, Weiser and Lemhi River sub-basins, each of

which is subject to a previous adjudication of water rights. The director argues, however, that the only inquiry necessary to resolve the issue of any adjudicated tributary is whether the United States refuses to consent to the jurisdiction of this court if the above tributary sub-basins are excluded. According to the director, I.C. Sec. 42-1406A(3) (b) is a carefully balanced legislative compromise which is clear on its face, and if the United States refuses to consent to jurisdiction of this court, all tributary sub-basins below the confluence of the Snake and Salmon Rivers must be included in the adjudication.

The United States, arguing that none of the four above mentioned tributary sub-basins have been fully or finally adjudicated, has refused to consent to the jurisdiction of this court without their inclusion in the adjudication. Moreover, the United States argues that exclusion of any tributary sub-basin automatically defeats this court's jurisdiction over the United States under the McCarran amendment. An adjudication without the four sub-basins, the United States claims, would not be a comprehensive, general adjudication of all rights *inter se* within the exterior boundaries of the adjudication.

The primary opponents to inclusion of the Boise, Payette, Weiser and Lemhi River tributaries are the Boise-Kuna, Nampa and Meridian, New York, Wilder and Big Bend irrigation districts (the "districts"). The districts argue the I.C. Sec. 42-1406A(3) (b) does not grant the United States unfettered discretion to refuse to consent to the jurisdiction of this court. The districts maintain that the United States must consent to the jurisdiction of this court to adjudicate all federal or Indian water rights if the conditions of the McCarran amendment are satisfied,

regardless of whether any adjudicated tributaries are included or not. According to the districts, no logical or practical reasons exist to include the above mentioned tributaries in the Snake River basin adjudication. The districts maintain that general adjudications have already occurred or are occurring for these four tributary sub-basins, that these general adjudications are adequate, and that no need exists to interfere with them. The Lemhi Irrigation District and the Upper Snake River Valley Protective Union have joined the districts in their objection to inclusion of the four tributary sub-basins.

This court finds that all tributary sub-basins in the Snake River basin must be included in the Snake River adjudication. First, I.C. Sec. 42-1406A(3) (b) is a carefully balanced legislative compromise between up river and down river interests on the Snake River. The statute is clear on its face. The only inquiry needed by this court is whether the United States has refused to consent to the jurisdiction of this court to adjudicate all federal and Indian water rights pursuant to the McCarran amendment. While this court agrees with the districts that the McCarran amendment was not intended to grant to the United States the discretion to refuse to consent to a general adjudication of all rights on a given stream, if the Idaho legislature chose to exclude certain sub-basins from a general adjudication of the Snake River on the condition that the United States consent, this court is bound by and agrees with that legislative decision. Absent the consent of the United States, exclusion of these four sub-basins would divest this court of jurisdiction over the United States under the terms of the McCarran amendment. The legislature quite clearly reached the

same determination. Based on the brief, argument, and exhibits submitted by the United States, this court hereby finds that the United States has refused to consent to the adjudication of all federal and Indian water rights absent the inclusion of the four above mentioned tributary sub-basins.

It also appears that the purposes and policy of I.C.Sec. 42-1406A cannot be achieved if four major sub-basins are excluded from the adjudication. A comprehensive adjudication of all water rights in the Snake River basin cannot occur without including the sub-basins. This court expresses no opinion at this time on whether prior decrees on these sub-basins may be incorporated into the Snake River basin adjudication. The four sub-basins, however, must be included in the adjudication in order to resolve competing claims to water rights on the Snake River, to develop a comprehensive water plan, to efficiently manage the state's water resources, and to obtain secure jurisdiction over federal and Indian water rights in the Snake River basin.

The districts argue that the United States may only refuse to consent to the jurisdiction of this court if that refusal is lawful under the terms of the McCarran amendment. While this court has found that I.C. Sec. 42-1406A(3) (b) is clear on its fact and does not require this court to find that the United States has lawfully refused to consent pursuant to the McCarran amendment, this court so finds nonetheless. As stated earlier, the McCarran amendment, cases interpreting it and the legislative history to it require that an adjudication be a general adjudication of all rights *inter se* of a river system or other source in order to obtain jurisdiction over the

United States. The United States cannot lawfully be required to consent to the jurisdiction of this court unless every effort is made to include each and every party claiming a water right to the Snake River basin. The purpose of the McCarran amendment was to obtain jurisdiction over the federal government in order that states may manage their respective waters in an efficient and practical manner. Excluding the Boise, Payette, Weiser and Lemhi tributary sub-basins from the Snake River basin adjudication can only result in duplication and confusion. This court finds the inclusion of these sub-basins is necessary in order to obtain lawful jurisdiction over the United States. While this finding is not necessary to a determination of the issue presently before this court, it is nonetheless important.

II. CLASSES OF WATER USERS WITHIN THE SYSTEM AND THE BOUNDARIES OF ANY HYDROLOGIC SUB-BASINS WITHIN THE SYSTEM FOR WHICH PROCEEDINGS MAY ADVANCE SEPARATELY.

The commencement order must define the classes of water users within the system and the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately, pursuant to I.C. Secs. 42-1408 through 42-1414. I.C. Sec. 42-1406A(2)(c). The director, in his petition, has stated that there are no classes of *uses* proposed to be separately adjudicated, and there are no hydrologic sub-basins proposed to be separately adjudicated. Petition, p. 5 and 9. This court will presume that the director meant "there are no classes of users" proposed to be separately adjudicated. No objection has been raised by any party to the commencement

hearing concerning the director's decision not to separately adjudicate any particular hydrologic sub-basins or classes of water users. Therefore, all classes of water users within the system and all hydrologic sub-basins within the system shall be adjudicated as part of the comprehensive Snake River adjudication.

III. USES OF WATER EXCLUDED FROM THE ADJUDICATION.

The commencement order must also define any uses of water to be excluded from the adjudication proceedings. I.C. Sec. 42-1406A(2) (d). The director, in his petition, has stated that there are no classes of uses proposed to be excluded from the adjudication. Petition, p. 9. Several parties have commented, but not formally objected, to the director's failure to exclude stock water and domestic uses from the adjudication. The Committee of Nine, elected representatives of Water District No. 1 of the state of Idaho, have asserted that consideration should be given to omitting all domestic and stock watering rights from the Snake River basin adjudication. According to the Committee of Nine, including domestic and stock water rights in the adjudication will unnecessarily increase the scope and cost of the adjudication without corresponding benefits. Similarly, the upper Snake River Valley Protective Union has suggested that domestic and stock water uses should be excluded from the adjudication. According to the Protective Union, there is simply no reason to incur the expense and delay of processing stock water and domestic water rights.

Under the terms of the McCarran amendment, the cases interpreting it, and legislative history, it is clear that all uses within a particular river system or other source must be included in order to obtain jurisdiction over the United States. The legislative history to the McCarran amendment is replete with references to the need to have *all parties* and *all claims* before the court in order to efficiently and justly adjudicate the river system or source. In *Dugan v. Rank,* the Supreme Court held that a McCarran amendment adjudication is one which reaches all of the rights of various owners on a given stream. In *Eagle County,* the Supreme Court found that the supplemental adjudication of the Eagle River and its tributaries involved the whole community of claims, and, hence, was a general adjudication within the terms of the McCarran amendment. Finally, in *Water Division No. 5,* the court found the general adjudication in that case sufficient for McCarran amendment jurisdiction in part because the adjudication reached all claims to the Colorado River and its tributaries, excluding the Gunnison River. In summation, in order to satisfy McCarran amendment, jurisdiction, domestic and stock water uses must be included in the Snake River basin adjudication. Similarly, it is also clear that I.C. Sec. 42-1406A requires *all rights* to the water of the Snake River basin be included in the adjudication.

CONCLUSION

I.C. Sec. 42-1406A, the McCarran amendment, the purposes and policies behind those statutes, and the

legislative history to those statutes requires that a comprehensive determination of the nature, extent and priority of all rights to the Snake River basin be made. In order to further the purposes of I.C. Sec. 42-1406A, and to obtain complete jurisdiction over all federal and Indian water rights in the Snake River basin, a comprehensive adjudication of the entire Snake River basin, including all uses of water, must be made. This court hereby requests the director to submit a proposed order of commencement pursuant to this opinion.

DATED this 14 day of October, 1987.

/s/ Daniel C. Hurlbutt, Jr.
DANIEL C. HURLBUTT, JR.
District Judge

CERTIFICATE OF MAILING

The undersigned certifies that on the 15 day of October, 1987, she caused to be mailed, or hand delivered, a copy of the foregoing memorandum opinion on commencement of adjudication to:

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42-1406A. Snake River basin adjudication – Commencement. –

(1) Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) The boundaries of the system within the state to be adjudicated;

(b) Any class of water users within the system and the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(c) The uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) Authorizes the director to commence an investigation and determination of the various water rights to be adjudicated within the system;

(b) Defines the boundaries of the system within the state to be adjudicated;

(c) Defines the classes of water users within the system and the boundaries of any hydrologic subbasins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1414, Idaho Code; and

(d) Defines any uses of water excluded from the adjudication proceedings; the adjudication shall proceed in the manner provided under the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407, Idaho Code.

(3) In exercising his authority under subsection (1) of this section, the director of the department of water resources:

(a) Shall petition the district court to commence an adjudication of the water rights of all of the Snake River basin within the state of Idaho upstream from the point at which the Snake River leaves the state of Idaho and enters the state of Oregon in section 14, township 4 north, range 6 west, Boise Meridian;

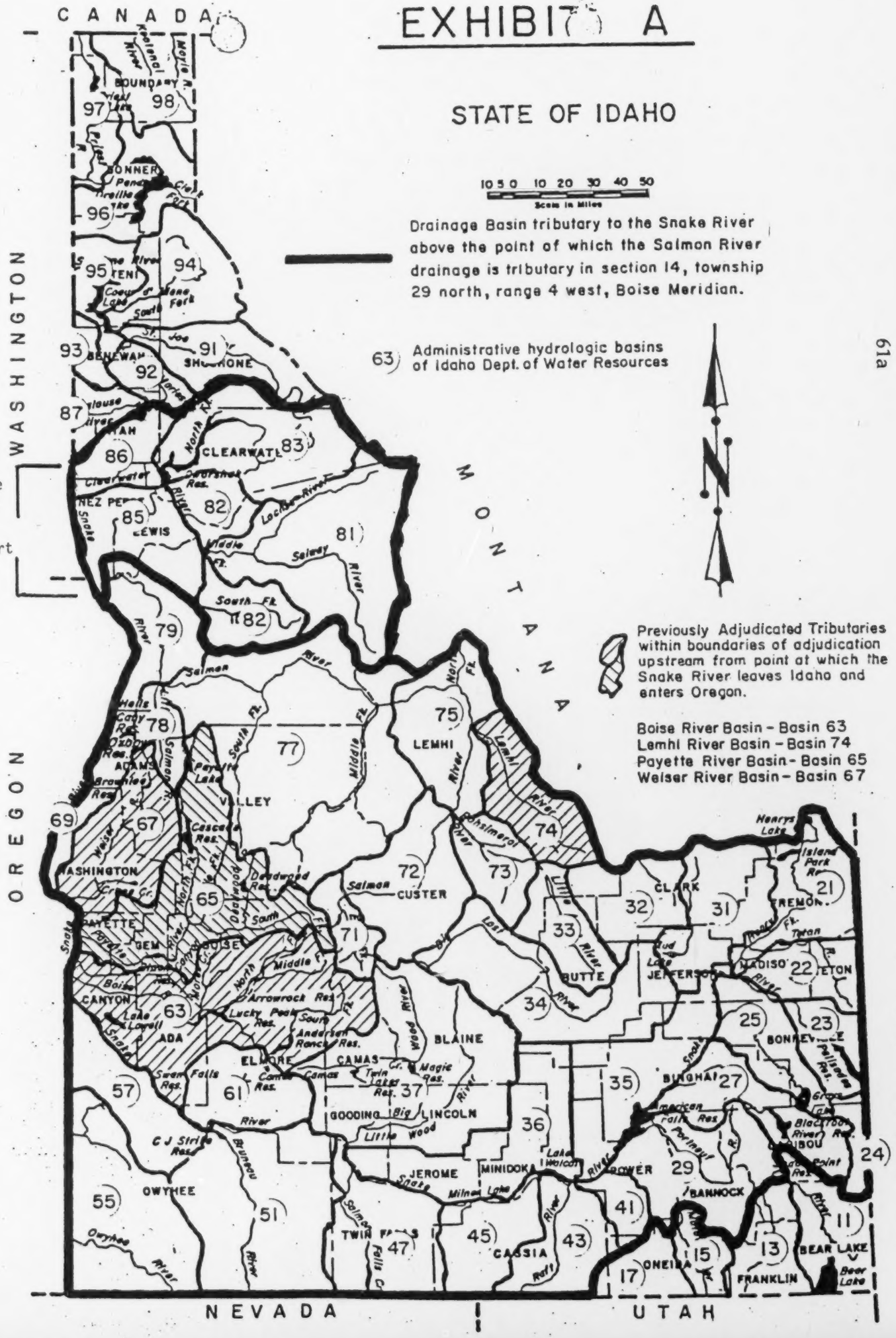
(b) May petition the district court to commence an adjudication of the water rights of the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington. The director may include within his petition under this paragraph any unadjudicated tributaries. The director shall not include in the petition filed under this paragraph any adjudicated tributary unless the United States, or other parties whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. section 666. [I.C., § 42-1406A, as added by 1985, ch. 18, § 1, p. 27; am. 1985, ch. 188, § 1, p. 286.]

EXHIBIT A

SNAKE RIVER BASIN WATER SYSTEM

STATE OF IDAHO

EXHIBIT A



"Lower" Snake River basin added by district court

PETITION

No. 88-1170 (2)

Supreme Court, U.S.
FILED
FEB 9 1989
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CLERK

In The

Supreme Court of the United States

October Term, 1988

BOISE-KUNA IRRIGATION DISTRICT,
NAMPA & MERIDIAN IRRIGATION DISTRICT,
NEW YORK IRRIGATION DISTRICT,
WILDER IRRIGATION DISTRICT,
BIG BEND IRRIGATION DISTRICT
AND WEISER IRRIGATION DISTRICT,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,
AND THE TWIN FALLS CANAL CO.
AND NORTH SIDE CANAL CO.
AND STATE OF IDAHO,

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF FOR THE STATE OF IDAHO IN OPPOSITION

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QUESTIONS PRESENTED

Does the McCarran Amendment, 43 U.S.C. § 666, require the inclusion of all water right claimants upstream from the terminus point of a state court general adjudication of water rights in order to obtain jurisdiction over the United States in that state court proceeding?

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BRIEF FOR THE STATE OF IDAHO IN OPPOSITION

OPINIONS BELOW

The opinions below are fully set forth in the petition for a writ of certiorari.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on October 13, 1988 affirming the decision of the district court requiring the inclusion of four previously adjudicated tributaries of the Snake River in the Snake River Basin adjudication. Pet. at 5, 8a.[1] Although the district court relied on both state law and federal law to support its decision, the Idaho Supreme Court rejected the state law basis and determined that the McCarran Amendment, 43 U.S.C. § 666, requires the inclusion of all water right claimants upstream from the terminus point of a state court general adjudication of water rights in order to obtain jurisdiction over the United States in the state court proceeding.

STATUTES INVOLVED

The statutes involved are set forth fully in the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners did not set forth the status of the adjudications in the Boise and Weiser River subbasins in their statement of the case. An understanding of the old adjudications in those two subbasins is critical to the Idaho

[1] The phrase "four adjudicated tributaries refers to the Boise, Lemhi, Payette, and Weiser Rivers. 764 P. 2d at 81. Pet. at 8a. Although other adjudicated tributaries exist in the Snake River Basin, Idaho Code § 42-1406A does not apply to them.

Supreme Court's judgment. Thus, the respondents supplement the statement of the case in the petition for certiorari by providing that explanation.

i. The Boise River.

The Boise River Basin encompases an area beginning on the western edge of the Sawtooth Range in the Trinity Mountains near central Idaho, extending south to the Mountain Home Desert and west to the Snake River near Nyssa, Oregon. Exhibit 180.

The water rights delivered by the Boise River watermaster within Water District 63 are all downstream of Lucky Peak Reservoir with the exception of storage from federally controlled facilities at and above Lucky Peak Dam. Exhibits 1004, 1005. Those water rights which are delivered arise from a number of court decrees. The two most important decrees are the Stewart and Bryan decrees discussed below.

The Seventh Judicial district court for Canyon County entered on January 20, 1906, its water rights adjudication decree in *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District Limited,* Canyon County Civil Case No. 1323X, *aff'd* 14 Idaho 450, 94 P. 761 (1908); *aff'd in part, rev'd in part,* 16 Idaho 525, 102 P. 481 (1909) (Stewart Decree). The Stewart Decree lists approximately 133 water rights of approximately 200 named parties. The United States was not a party to this adjudication. This decree did not adjudicate rights to the use of ground water.

The Seventh Judicial district court for Canyon County entered on February 16, 1929 its water rights adjudication decree in *Pioneer Irrigation District v. American Ditch Association,* Canyon County Civil Case No. 5301½, *aff'd in part, rev'd in part;* 50 Idaho 732, 1 P. 2d 196 (1931) (Bryan Decree). The Bryan Decree adjudicated the rights to the use of surface waters among over 100 named corporate and individual defendants. The United States filed a "Complaint in Intervention of United States of America" on November 2, 1915, and a "Supplemental Complaint in Intervention of United States of America" on March 7, 1927. Exhibits 40, 41.

The Idaho Supreme Court's opinion in *Pioneer Irrigation District* reversed the Bryan Decree regarding the determination of those rights of the United States then before the court. 50 Idaho at 752. There is no evidence in the record to show that the state district court ever resolved the issues concerning the United States claims on remand.

ii. The Weiser River.

The Seventh Judicial district court for Washington County entered its water rights adjudication decree on June 21, 1921, in *Muir v. Allison,* Washington County Civil Nos. 823 and 1370, *rev'd and remanded,* 33 Idaho 146, 191 P. 206 (1920). This decree adjudicated approximately 496 rights of 920 named parties. The United States was not a party to this adjudication. The decree did not include ground water.

SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari because the Idaho Supreme Court correctly applied past decisions of this Court to include two subbasins within the Snake River Basin general adjudication of water rights. In addition, the practical effect of denying the petition is to include two subbasins within the Snake River Basin general adjudication and to incorporate some old decrees into a comprehensive decree adjudicating all rights to the use of water within the Snake River Basin.

ARGUMENT

I

THIS CASE DOES NOT PRESENT THE SPECIAL AND IMPORTANT REASONS WARRANTING REVIEW BY THIS COURT

The petitioners argue that this case "violates the precedents of this Court and other courts, [and that] it will also cause irreparable harm to the states' administration of their water resources." Pet. at 22. The Idaho Supreme Court judgment does neither; therefore, the respondent opposes the petition for a writ of certiorari.

Fundamentally, this action arises out of the Swan Falls water rights dispute between the Idaho Power Company and the respondent.[2] This dispute concerned "conflicting claims to utilization of the waters of the Snake

[2] The Swan Falls water rights dispute acquired its name from the Swan Falls Dam and Hydroelectric Facility owned by Idaho Power Company that was the focus of the dispute.

River between competing interests of power generation and agricultural irrigation." *Idaho Power Co. v. State*, 104 Idaho 575, 578, 661 P. 2d 741, 744 (1983). After seven years of litigation the Idaho Power Co. and respondent entered into a settlement agreement dated October 25, 1984. Exhibit 179. The settlement agreement proposed a new management approach for the Snake River Basin. It increased required minimum stream flows; it subordinated Idaho Power Company's hydropower water rights in excess of those minimum flows; and it proposed legislation to provide the information necessary to manage the Snake River in accordance with the settlement agreement.

A part of the proposed legislative program was a bill requiring a general adjudication of rights to the use of water in the Snake River Basin. Exhibit 179. This bill was approved as Idaho Code § 42-1406A. The statute makes clear the legislative desire for a general adjudication that would result in a determination of federal and state water rights. The statute also has a unique provision, however, to accommodate the desire of some local water users to be left out of the general adjudication. The focal point of the present dispute is this latter provision of Idaho Code § 42-1406A.

Idaho Code § 42-1406A(3)(b) states, in part, that "[t]he director shall not include in the petition filed under this paragraph any adjudicated tributary unless the United States, or other party whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran Amendment, 43 U.S.C.

§ 666." The interpretation of this reference to the McCarran Amendment was the subject of much dispute in the courts below.

The respondent argued that the Legislature intended Idaho Code § 42-1406A(3)(b) merely to require the determination of whether the United States in fact refuses to consent to the exclusion of the four adjudicated tributaries. If so, the respondent argued that as a matter of state law the four adjudicated tributaries must be included. Although the district court agreed with this argument, the Idaho Supreme Court rejected the argument on the basis that it would constitute an improper delegation of legislative authority. The court instead interpreted Idaho Code § 42-1406A(3)(b) to require compliance with the McCarran Amendment. The court concluded that federal law required the inclusion of the Boise and Weiser River subbasins in the general adjudication.[3] Absent the problem of improper delegation of legislative authority, this case would not have presented a federal law issue for review by this court.

The petitioners argue that the Idaho Supreme Court incorrectly imposed a geographic limitation on the discretion of states to set the boundaries of a general adjudication. Pet. at 14-15. The Idaho Supreme Court's decision does not rest on some novel analysis of geography as

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[3] Parties from the Lemhi and Payette River Basins did not appeal the inclusion of those basins within the general adjudication. Water users from the Boise and Weiser River Basins are the only parties who appealed from the state district court judgment. Thus, the inclusion of the Boise and Weiser River basins is the only issue before this Court.

suggested by petitioners. Rather, its decision is a direct implementation of past decisions of this Court.

The Idaho Supreme Court explained its rationale for including the Boise and Weiser River subbasins in the adjudication in the following statement: "The record demonstrates that none of these adjudicated tributaries [referring to the Boise and Weiser Rivers, among others] have been fully adjudicated as to all water rights of the United States pursuant to the McCarran Amendment." 764 P.2d at 81, Pet. at 8a-9a. The court then applied this Court's decision in *Dugan v. Rank*, 372 U.S. 609 (1963), to require the inclusion of the Boise and Weiser River subbasins in the adjudication, 764 P.2d 85, Pet. at 17a-18a.[4]

The court then explained why the petitioners' reliance on two decisions concerning the Colorado adjudication procedure was misplaced. *United States v. District Court in and for the County of Eagle*, 401 U.S. 520

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[4] The United States asserted that this Court's past decisions require all water users upstream from the terminus point of an adjudication to be included in the general adjudication. Although the respondent has not contested this assertion in this proceeding, the respondent does not agree with it. The respondent's interpretation is that the McCarran Amendment only requires inclusion of those persons who possess federal reserved water rights or who are required by state law to obtain a state water right through a permit/license system. The distinction is illustrated by reference to state law. Idaho state law does not require a person who constructs a well for domestic use to obtain a state water right permit/license. Idaho Code § 42-227. The decision to omit domestic use from ground water from the required state permit/license system reflects a judgment that such uses are so small as not to require administration by a watermaster. The United States assertion would require such persons to be made parties; the respondent's interpretation would not.

(1971) and *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971). The court stated:

> While it is true that the United States Supreme Court agreed with the Colorado Supreme Court that the Eagle River, a tributary of the Colorado River, could be adjudicated under the McCarran Amendment, even though other parts of the Colorado River system within Colorado were not adjudicated in the same proceeding, this decision must be read in light of the unique system of water adjudication that exists in Colorado. In *United States v. District Court, Water Division No. 5, Colorado,* the Supreme Court clarified why the adjudication by district or division under the unique Colorado system qualified as a "general adjudication" under the McCarran Amendment:
>
> > The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; . . . .
>
> 401 U.S. at 530, 91 S. Ct. at 1005.
>
> Even though the Gunnison River was excluded from the adjudication in water division 5, it was included in the adjudication of water division 4. Colo. Rev. Stat. Annot. § 37-92-201(1)(d) (1973). Thus, the Gunnison River was adjudicated under the McCarran Amendment as part of Colorado's unique system of determining water rights. When read in the context of the system of adjudication in Colorado, neither *Eagle County* nor *Water Division No. 5* would support the exclusion of the Boise River or the Weiser River from this adjudication.

764 P.2d at 86, Pet. at 19a-20a. The above analysis is a correct application of this Court's prior precedent and does not warrant review by this Court.

Colorado statutory procedures provide for another ongoing adjudication proceeding with coordination between the resulting decrees. *United States v. District*

Court in and for the County of Eagle, 169 Colo. 555, 570, 458 P. 2d 760, 767 (1969) *aff'd* 401 U.S. 520 (1971). Unlike Colorado, Idaho law does not provide an ongoing, coordinated adjudication proceeding. The Idaho Supreme Court concluded that the decrees on the Boise and Weiser River subbasins were not fully adjudicated. 764 P.2d at 81, Pet. at 8a-9a. Idaho law does not provide any assurance that those old decrees will be made comprehensive.[5] Thus, there is no assurance that all rights within the Snake River basin will ultimately be adjudicated. For those reasons the Idaho Supreme Court was correct in concluding that the decisions of this Court regarding the Colorado procedure do not support the exclusion of the Boise and Weiser River subbasins.

The petitioners also argued that the Idaho Supreme Court's judgment causes irreparable harm to state administration. The petitioners explain their concern as follows:

> For example, it would mean that Washington and Oregon, in order to adjudicate a portion of the Columbia River, would have to adjudicate the entire Columbia River system within their states. For Montana to have a general adjudication of a portion of the Missouri River, it would have to adjudicate the entire Missouri River and its tributaries within the state. For Colorado, Utah or Arizona to adjudicate a portion of the Colorado River, they would have to

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[5] Idaho Code § 42-1406 authorizes the director of the Idaho Department of Water Resources to petition a state district court for an order commencing a general adjudication at any time upon a finding of public interest and necessity. However, this section does not require the commencement of a general adjudication of each river basin.

> adjudicate the entire Colorado River and all its tributaries within their states. Moreover, on the many smaller river systems in the western states, it could mean that the states would have no discretion to adjudicate portions of a river, such as the upper half or the lower half. The decision of the Idaho Supreme Court is thus of national importance and deserves consideration by this Court.

Pet. at 23-24. This argument overstates the court's rationale in this case and the practical result of the court's opinion.

The respondent's original petition in this case only requested an adjudication of the Snake River Basin upstream from and including the Salmon River basin. R. Vol. I, pp. 4 *et seq.* *See* Pet. at 61a. The state district court concluded that the McCarran Amendment required the inclusion of the lower Snake River basin in the state of Idaho downstream from the confluence of the Salmon River. Pet. at 49a. However, no party challenged this addition to the geographic scope of the adjudication in proceedings before the Idaho Supreme Court. Thus, the issue of whether an entire basin within one state must be included in one general adjudication was not before the court. Any statements by the Idaho Supreme Court to that effect are dicta.[6]

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[6] The Idaho Supreme Court made the following statement: "The McCarran Amendment requires the adjudication of all those who use water of a river system within a state, including those who use the water of tributaries." 764 P. 2d at 86. This statement is dicta to the extent it concludes the entire Snake River Basin within the state must be included within one general adjudication proceeding for purposes of the McCarran Amendment.

The practical effect of the Idaho Supreme Court's judgment is to include two subbasins within the Snake River Basin general adjudication and to incorporate these old decrees into a comprehensive decree adjudicating all rights to the use of water within the Snake River Basin. This will result in better administration of the entire Snake River Basin.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 9th day of February, 1989.

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(3)

No. 88-1170

In the Supreme Court of the United States

OCTOBER TERM, 1988

BOISE-KUNA IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The McCarran Amendment provides consent to the joinder of the United States as a defendant "in any suit * * * for the adjudication of rights to the use of water of a river system or other source" (43 U.S.C. 666). The question presented is whether joinder of the United States under the McCarran Amendment in an adjudication of rights to the use of water of Idaho's Snake River system requires the inclusion, within the geographic scope of that adjudication, of two tributary sub-basins.

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In the Supreme Court of the United States

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No. 88-1170

BOISE-KUNA IRRIGATION DISTRICT, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet. App. 1a-26a) is reported at 764 P.2d 78. The opinion of the Idaho district court (Pet. App. 27a-57a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on October 13, 1988. The petition for a writ of certiorari was filed on January 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). See note 2, *infra*.

STATEMENT

1. In 1986, the Idaho state legislature enacted legislation requiring "a comprehensive determination of the

nature, extent and priority of the rights of all users of surface and ground water from [the Snake River] system." Idaho Code § 42-1406A(1) (Supp. 1988). To accomplish this comprehensive determination, the legislature required that "the director of the department of water resources shall petition the district court to commence an adjudication within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights of the Snake River Basin * * *" (Idaho Code § 42-1406A(1) (Supp. 1988)). The McCarran Amendment provides congressional consent "to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source * * *" (43 U.S.C. 666).

The Idaho statute prescribes the contents of the director's petition, including, in subparagraph (3), both mandatory and discretionary directives concerning the geographic scope of the proposed adjudication to be sought in the petition. Subparagraph 3(b) permits the director to include "adjudication of the water rights of the main stem of the Snake River which forms the boundary between the state of Idaho and the states of Oregon and Washington." Idaho Code § 42-1406A(3)(b) (Supp. 1988). The director is further granted discretion in this subparagraph to include any unadjudicated tributaries to this part of the mainstem in the petition, but he "shall not include in the petition * * * any adjudicated tributary unless the United States, or other parties whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 43 U.S.C. section 666." Idaho Code § 42-1406A(3)(b) (Supp. 1988). The Boise and Weiser Rivers are both tributaries of the Snake River, and both join the Snake River along the portion of the mainstem that forms the boundary between Idaho and Oregon.

2. The Idaho director of water resources filed a petition on June 17, 1987 (Pet. App. 28a-29a), pursuant to Idaho Code § 42-1406A, requesting that the district court "commence an adjudication, within the terms of the McCarran amendment, of the water rights of the Snake River basin" (Pet. App. 27a-28a). The petition, in proposing specific geographic boundaries for the adjudication (*id.* at 29a), excluded the Boise River and Weiser River tributary sub-basins and two other sub-basins not at issue here (*id.* at 49a).

The United States and a number or other parties objected to the exclusion of the Boise and Weiser sub-basins (Pet. App. 50a). The United States urged that the Boise and Weiser tributaries, which contributed to the total flow of the Snake River, had to be adjudicated to determine the downstream water rights at issue in the proposed general stream adjudication. The United States further urged that exclusion of the Boise and Weiser sub-basins would defeat McCarran Amendment jurisdiction over the United States because the state court proceeding would not be a comprehensive, general adjudication of all water rights within the river system (*ibid.*).[1]

The district court ruled, among other matters, that the Boise and Weiser River sub-basins must be included in

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[1] The State of Idaho itself recognized that the tributary water rights had not been fully or finally adjudicated. The state director's petition indicated that past adjudications involving the Boise and Weiser Rivers had concerned only rights to the use of surface water and not to the use of groundwater, and that the United States was at most a party to only one of the two major decrees concerning rights to surface water on the Boise River, and was not a party to any decree concerning rights to surface water on the Weiser River (Petition for the General Adjudication of Rights to the Use of Water from Snake River Basin Water System, No. 39576 (5th Dist. Ct. June 17, 1987), paras. 15, 16).

the general stream adjudication. Pet. App. 27a-57a. The court concluded that under Idaho Code § 42-1406A's "consent" provision the United States' objection to the exclusion of those sub-basins was sufficient, by itself, to require their inclusion in the general stream adjudication (Pet. App. 49a-50a). In addition, the court agreed with the United States that "the McCarran amendment, cases interpreting it and the legislative history to it require that an adjudication be a general adjudication of all rights *inter se* of a river system or other source in order to obtain jurisdiction over the United States" (*id.* at 52a). The court recognized that "[a] comprehensive adjudication of all water rights in the Snake River basin cannot occur without including the sub-basins" (*ibid.*) and that "the inclusion of these sub-basins is necessary in order to obtain lawful jurisdiction over the United States" (*id.* at 53a).

3. The Idaho Supreme Court affirmed the district court's order. Pet. App. 4a-26a. The state supreme court disagreed with the district court's conclusion that under Idaho Code § 42-1406A the United States' objection in this litigation was sufficient, by itself, to require inclusion of the two sub-basins. The court construed Idaho Code 42-1406A's consent provision as referring "to the existing consent by Congress in the McCarran Amendment" (Pet. App. 13a), and "not to some special consent of the United States" (*id.* at 14a).

The court nevertheless concluded that the McCarran Amendment's consent to joinder in "the adjudication of rights to the use of water of a river system" (43 U.S.C. 666) required that the adjudication of the Snake River system include determination of water rights in the hydrologically related Boise and Weiser sub-basins. Pet. App. 14a-21a. The court recounted the consistent reading given the McCarran Amendment by this Court and the lower federal courts (*id.* at 14a-18a). The court specifi-

cally rejected (*id.* at 18a-20a) petitioners' contention that this Court's decisions in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971), and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527 (1971), required a different result.

ARGUMENT

The Idaho Supreme Court correctly held that the McCarran Amendment does not permit the State of Idaho to join the United States in a general stream adjudication of the Snake River system unless the adjudication includes two hydrologically related sub-basins. The State of Idaho, which initiated the stream adjudication and is a respondent to the petition for a writ of certiorari, agrees with that holding. The Idaho Supreme Court's decision does not conflict with any decision of this Court or any other court. Accordingly, further review is not warranted.[2]

1. The McCarran Amendment's plain language controls this case. That statute permits joinder of the United States in suits "for the adjudication of rights to the use of water in a *river system*" (43 U.S.C. 666 (emphasis added)). The term "river system"—by definition—includes the river's main stem *and* its contributing branches. See, *e.g.*, *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, 523 (1971) ("the Eagle [River] and its tributaries" are "a 'river system' within the meaning of

[2] We do not contest that the judgment of the Idaho Supreme Court is final for purposes of 28 U.S.C. 1257(3). The federal issue here "has been finally decided in the state courts with further proceedings pending in which the part[ies] seeking review here might prevail on the merits on nonfederal grounds" and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" with respect to those parties. See, *e.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-485 (1975).

the Act"). Thus, the McCarran Amendment here quite plainly limits joinder of the United States to an adjudication of rights to the use of water of the Snake River and its tributaries.

Congress's objective in including tributaries is obvious. Since a general stream adjudication involves the apportionment of competing claims to a limited resource, it cannot proceed unless all of the potential claimants are before the court. And since the upstream tributaries contribute to the total resource available for downstream apportionment, the upstream claims must be adjudicated to determine downstream flows and priorities. Thus, the inclusion of tributaries is necessary to ensure "a *general* adjudication of '*all* of the rights of various owners on a given stream' " (*Dugan* v. *Rank*, 372 U.S. 609, 618-619 (1963), quoting S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951) (emphasis added)). As the Idaho Supreme Court explained (Pet. App. 14a-16a), the McCarran Amendment's legislative history fully supports this view.[3]

Petitioners principally argue that the Idaho Supreme Court's interpretation of the McCarran Amendment is contrary to the federal policy of deference to state water law. See Pet. 11-14. A general policy cannot, however, override plain statutory language. Moreover, the Idaho Supreme Court's interpretation is manifestly consistent with Idaho's practices in administering water within its borders. As the State of Idaho has explained:

> The practical effect of the Idaho Supreme Court's judgment is to include two subbasins within the

[3] Petitioners describe the Boise and Weiser tributaries as "adjudicated" tributaries (see *e.g.*, Pet. 9), suggesting that the water rights in those sub-basins have already been determined. But as both of the lower courts (as well as the State of Idaho, see note 1, *supra*) recognized, the Boise and Weiser tributaries have not been fully and finally adjudicated. See Pet. App. 8a-9a, 52a.

> Snake River Basin general adjudication and to incorporate these old decrees into a comprehensive decree adjudicating all rights to the use of water within the Snake River Basin. This will result in better administration of the entire Snake River Basin.

Idaho Br. in Opp. 12.

Petitioners also characterize the Idaho Supreme Court's interpretation of the McCarran Amendment as " 'frivolous' and 'extremely technical' " (Pet. 20). Quite to the contrary, the court has simply construed the statute according to its plain terms and objectives. The court's adherence to the McCarran Amendment's language is particularly appropriate here because the statute provides a limited waiver of the United States' sovereign immunity and places claims against the United States within the jurisdiction of state courts. It is well settled that "when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). Furthermore, jurisdictional provisions, which are to " 'be read by judges with the minds of . . . specialists' " (*Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968)), "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes" (*ibid.*).

2. Petitioners appear to acknowledge (Pet. 10) that the Idaho Supreme Court's decision does not stand in square conflict with any decision of another court. They maintain, however, that the Idaho Supreme Court's decision "conflicts in principle" (*id.* at 10, 15) with this Court's decisions in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971), and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527 (1971). The Idaho Supreme Court correctly rejected that contention. See Pet. App. 18a-20a.

In *Eagle County*, this Court principally held that the McCarran Amendment permits state courts to adjudicate federal reserved water rights. 401 U.S. at 521-525. In the course of reaching that decision, the Court observed that "the Eagle [River] and its tributaries"—though a part of the Colorado River drainage basin—comprise "a 'river system' within the meaning of the Act" (*id.* at 523). That observation simply recognizes that a major river system may consist of a number of smaller river systems. Applied to the circumstances here, it would suggest that Idaho could have joined the United States in an action to adjudicate rights in a Snake River tributary, such as the Boise (or the Weiser) River, provided that the adjudication embraced all of *that* tributary's upstream constituent parts. But since Idaho wishes to join the United States in an action to adjudicate rights in the Snake River system, the adjudication correspondingly must include the Snake River's mainstem and all of *its* upstream constituent parts.

In *Water Division No. 5*, the Court approved the use of the McCarran Amendment to join the United States in an action brought under Colorado's unique water rights adjudication procedures, which consist of dividing the State's territory into a number of "water divisions" and determining claims in "monthly proceedings before a water referee" (401 U.S. at 528-529). The Court held that this approach amounted to a general stream adjudication because these ongoing judicial proceedings, held concurrently in the different divisions, would reach "all claims, perhaps month by month but inclusively in the totality" (401 U.S. at 529). Thus, *Water Division No. 5* simply stands for the proposition that a State has latitude to determine *how* to conduct a general stream adjudication; it does not alter the requirement that the adjudication em-

brace an entire "river system" (43 U.S.C. 666).[4]

Accordingly, the Idaho Supreme Court's decision in this case is entirely consistent with this Court's decisions in *Eagle County* and *Water Division No. 5*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioners contend that *Water Division No. 5* supports the exclusion of the Boise and Weiser Rivers from adjudication of the Snake River system because the Colorado legislature had placed the Colorado River and one of its tributaries, the Gunnison River, in separate water divisions. This Court noted, but did not comment on, that division. See 401 U.S. at 528. As the Idaho Supreme Court explained (Pet. App. 20a), the Colorado legislature's action does not conflict with the result in this case. The Colorado legislature's administrative scheme assures that the Gunnison River and its tributaries will be subject to a concurrent, ongoing adjudication of water rights, albeit in a geographically separate water division. Thus, Colorado's procedure fulfills the McCarran Amendment's basic goal of assuring a comprehensive determination of water rights. See generally *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 819-820 (1976).

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